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KARP TRUCHOBUK and  
WALTER ZIARKO,  
Plaintiffs,

v.

FRANK DILLON,  
Defendant-Appellee,

KARP TRUCHOBUK,  
Plaintiff-Appellant.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

341 I.A. 65

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE  
COURT.

Plaintiff Karp Truchobuk appeals from a judgment  
of the Superior court of Cook county denying his motion  
for a new trial and entering judgment upon the verdict  
of a jury.

The complaint filed by Karp Truchobuk and Walter  
Ziarko against defendant, Frank Dillon, consisted of  
two counts. Count I relates solely to the claim of  
Karp Truchobuk, plaintiff, and alleges that while on  
September 14, 1946, Truchobuk was riding as a guest  
passenger in an automobile, "and as such guest passenger  
had no control over the vehicle in which he was riding,"  
and "he was in the exercise of ordinary care for his own  
safety," defendant, Frank Dillon, carelessly and negli-  
gently operated his motor vehicle, and as the direct and  
proximate result of the wrongful act or acts of defendant,  
the latter's motor vehicle ran into the automobile in  
which plaintiff was riding and that he then and there  
suffered injuries. Count II relates solely to a claim



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of Walter Ziarko, plaintiff, in which the latter alleged that his automobile was damaged by the wrongful conduct of defendant, Frank Dillon. Plaintiff states that count II was dismissed at the time of the trial, although we have been unable to find in the record any mention of the abandonment of that count. The record shows, however, that the case went to the jury solely upon count I.

This case involves a collision of an automobile and a truck at the intersection of Ogden avenue and Pulaski road in the city of Chicago. Ogden avenue is one of the main arteries of travel in the city and runs in a northeasterly and southwesterly direction. There are double streetcar tracks on it. Traffic at the intersection was heavy and congested at the time of the accident and was moving slowly. Pulaski road runs north and south. Ziarko and Truchobuk were friends, often went fishing together, and Truchobuk was accustomed to riding with Ziarko in the latter's automobile. About a quarter to six o'clock on the morning of the accident they started for Lemont, Illinois, to fish there. They fished all day, cooked their lunch at the place, and were on their way home when the accident occurred, about 7:30 or 7:45 P.M. Ziarko is a cripple and he testified that he had to use a Model T Ford automobile in driving on account of his leg; that he cannot use his leg on the clutch of a regular car. Defendant was driving an Army ambulance, sixteen feet in length, that he had bought from the Army shortly before the



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accident. The color of the ambulance was Army drab and it had "a large four foot red cross in a white background, on the sides, on the top and on the back" of the vehicle. It was a noticeable vehicle. Ziarko testified that he was driving northeast in Ogden avenue; that he started to cross the intersection on the green light, driving fifteen miles per hour, when his automobile collided with the truck; that he "saw the truck for about 100 feet or better"; that he kept on a straight line and kept going; that the truck was going southwest and made a left turn when it was fifteen feet from him without stopping or signalling, and crashed his front wheel; that the truck "made a jump in front of me and I hit him on the right side of the truck"; that "I hit the right side of the truck with my car." Truchobuk testified that he had nothing to do with the operation of the car; that he could not tell the speed of a car as he had never driven one; that as they were crossing Pulaski road going east on Ogden there was an accident involving Walter Ziarko's car and a truck. "I was sitting on the right and the light was green, and that's all, I seen the truck, I hollered, and he grabbed at the emergency, but it was too close." The following then occurred: "Mr. Dooley [attorney for plaintiffs]: Now, you say you had started across with the green light; is that right? A. Yes. Q. And you saw this car in front of you; this truck? A. I never watched it at all. \* \* \* When I saw this





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truck, I just hollered, 'Watch out.' When I saw this truck it was about twelve or fifteen feet from Walter's car. The next thing I knew I was in the hospital." Upon cross-examination the following occurred: "Mr. Maciejewski [attorney for defendant]: And when is the first time before you were crossing into the intersection; when was the first time that you saw that the light was green? A. Before I came over to the light? Q. Yes. A. I never watched. I never drive the car; I never watch the light. Q. Did you watch it at that time? A. I just watched it and it was green light, but I never take a look. Q. Where was the car in which you were riding; where was that car when you saw the green light for the first time; how near to the intersection? A. Well, maybe twice of the length of the hallway, you know. Q. Twice the length of this room? A. The hallway, you know. Q. Of the hallway? A. Like that hallway. Q. About how far in feet would that be? A. About sixty, maybe a hundred feet. That was the first time that I saw the light and it was green then. The light was green and we kept going. I don't know how long it was on green. I never looked back any more. First time that I saw that the light was green was when Mr. Ziarko's car was about one hundred feet from the intersection. At the time when I first noticed the color of the light I wasn't watching this other truck that was in the collision, I was minding my own business.



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Mr. Maciejewski: Now, when you saw the truck you hollered to Walter to 'watch out.' Is that right? A. At the time I see the truck right in the front, yes. Q. Did you see this truck before you hollered to Walter to 'watch out'? A. That's all I seen. Q. You didn't see him until he was right in front of you? A. Close, about fifteen."

Defendant's testimony gives a different version of the accident. The substance of it is that he was driving southwest on Ogden avenue; that desiring to make a left-hand turn at Pulaski road he moved toward the center of Ogden avenue and entered the intersection on the green light going at a very low rate of speed, five or six miles per hour or less; that he came to a complete stop in the intersection with his automobile turned to go left on Pulaski road; that many automobilists were passing him on Ogden avenue; that the traffic was very heavy on that street; that he waited until the light turned red on Ogden avenue and the traffic on Ogden avenue stopped, and then, putting out his left hand, he proceeded across the intersection and had almost crossed when there was a collision. "Q. And what part of your ambulance was struck? A. The rear right, near the rear fender. Q. Well, where with reference to the rear wheel? A. Right almost at the rear wheel"; that "there was a big hole knocked in my truck." Defendant further testified that he did not, without stopping, make a sharp turn at the time and place in question.

Plaintiff's position is that defendant made a

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turn on the red light for Ogden avenue and was therefore guilty of negligence under Paragraph 166, Section 69, Chapter 95-1/2 (Ill. Rev. Stat. 1949), and also under Paragraph 129, Section 32, Chapter 95-1/2. This case presented an issue of fact for the jury to determine. What defendant did, if the jury believed his testimony, and they evidently did, is a very common movement in heavy traffic in large cities. An automobilist desiring to turn left on a heavily traveled thoroughfare frequently enters the intersection on the green light and has to wait for the change of the light before he can move to the left. According to defendant's testimony he followed a procedure enforced by traffic officers at busy intersections in Chicago.

The jury believed defendant's testimony and were, therefore, justified in finding that he was not guilty of negligence. The contention of defendant that plaintiff Ziarko was negligent at the time and place in question is strengthened by the fact that the able and astute counsel for plaintiffs saw fit to abandon the claim of Ziarko against defendant.

Plaintiff contends that the court erred in giving, at the request of defendant, the following instruction to the jury:

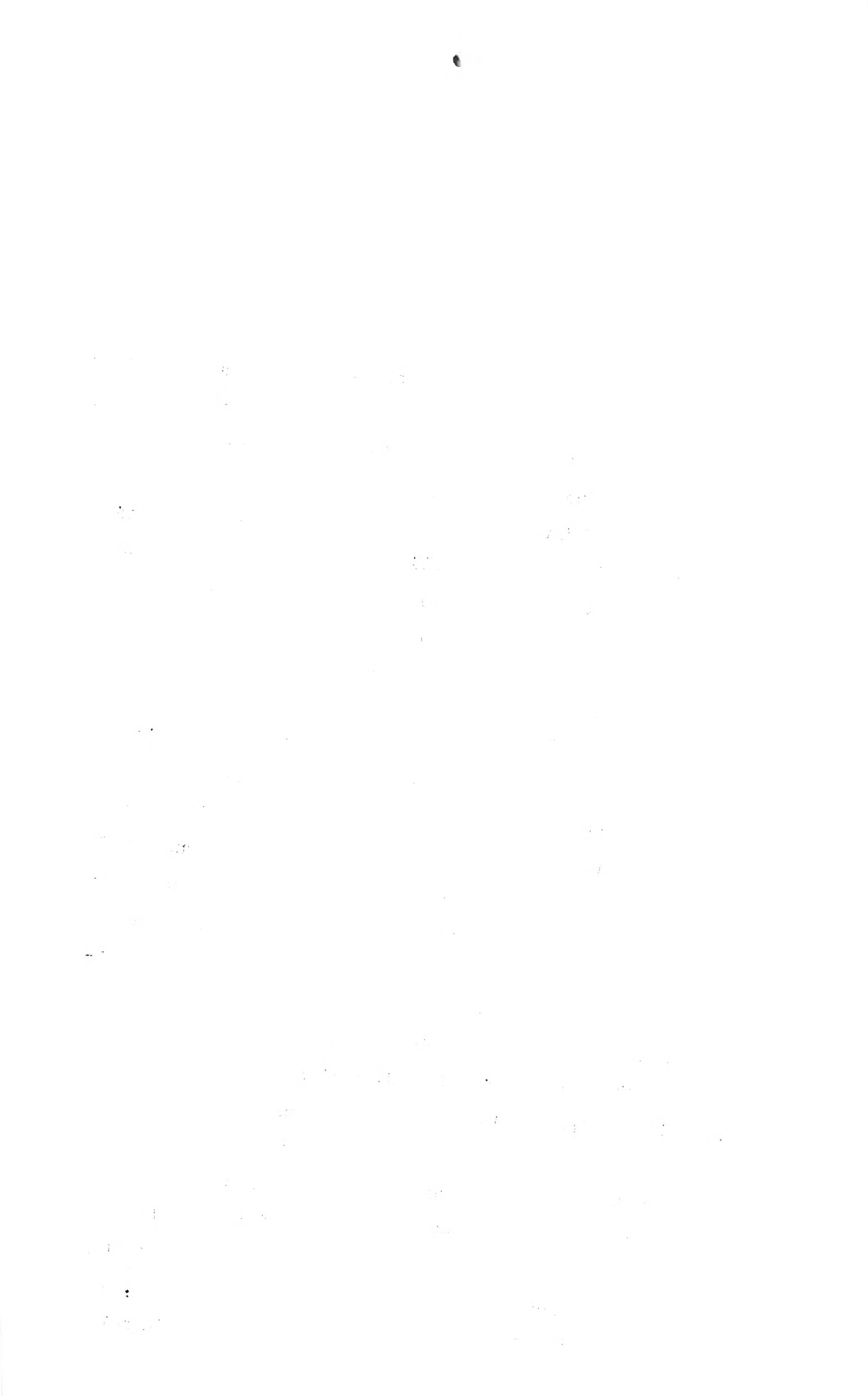
"12. You are instructed that the preponderance or greater weight of evidence in the case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts, and in determining on which side



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the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence."

Plaintiff contends that this instruction is erroneous because it fails to include the fact that the number of witnesses testifying to a particular fact or state of facts is among the elements to be considered in determining wherein the preponderance of the evidence lies. We do not think that this instruction ignores the fact that the number of witnesses testifying to a particular fact or state of facts is an element to be considered in determining on which side the preponderance of the evidence is. Indeed, that element is referred to in the instruction in a somewhat forceful way, but it is true that the instruction would have been improved if the drafter of it, in enumerating the things that the jury should take into consideration, had included at that point the element of the number of witnesses testifying to a particular fact or state of facts. However, we are satisfied that we would not be justified in holding





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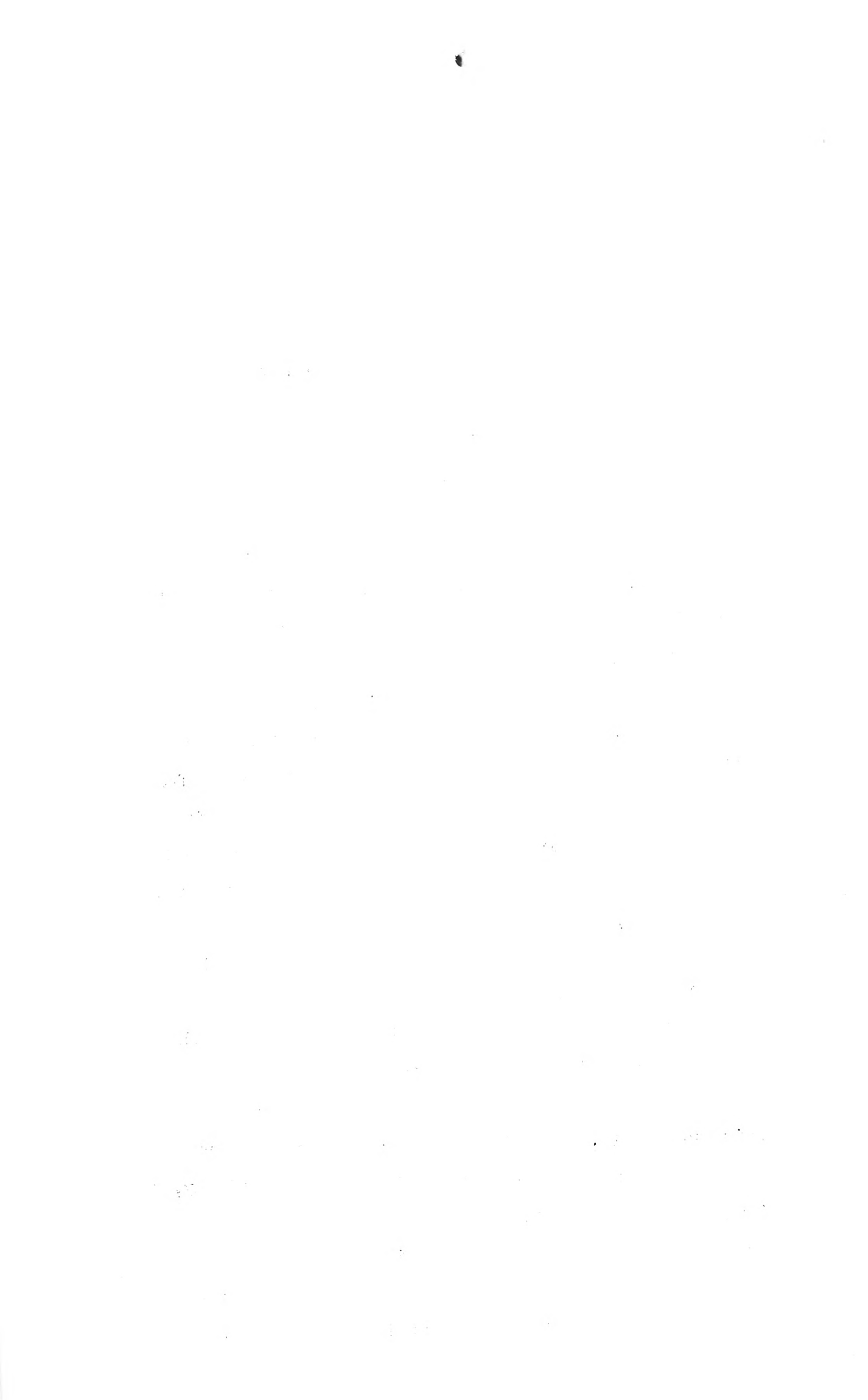
that the giving of defendant's instruction twelve constituted reversible error.

Plaintiff contends that the trial court erred in giving to the jury, at the request of defendant, the following instruction:

"9. You are instructed that the fact that the plaintiff was an occupant of an automobile involved in a collision with the automobile driven by the defendant, does not of itself relieve the plaintiff from the exercise of due care and caution for his own safety, and if you believe from the preponderance, or greater weight of all the evidence, that the plaintiff, Frank Truchobuk, at the time or immediately prior to the collision in question, was not in the exercise of due care and caution for his own safety, then you should find the defendant, Frank Dillon, not guilty."

The trial court also gave to the jury, at the request of plaintiff, the following instruction:

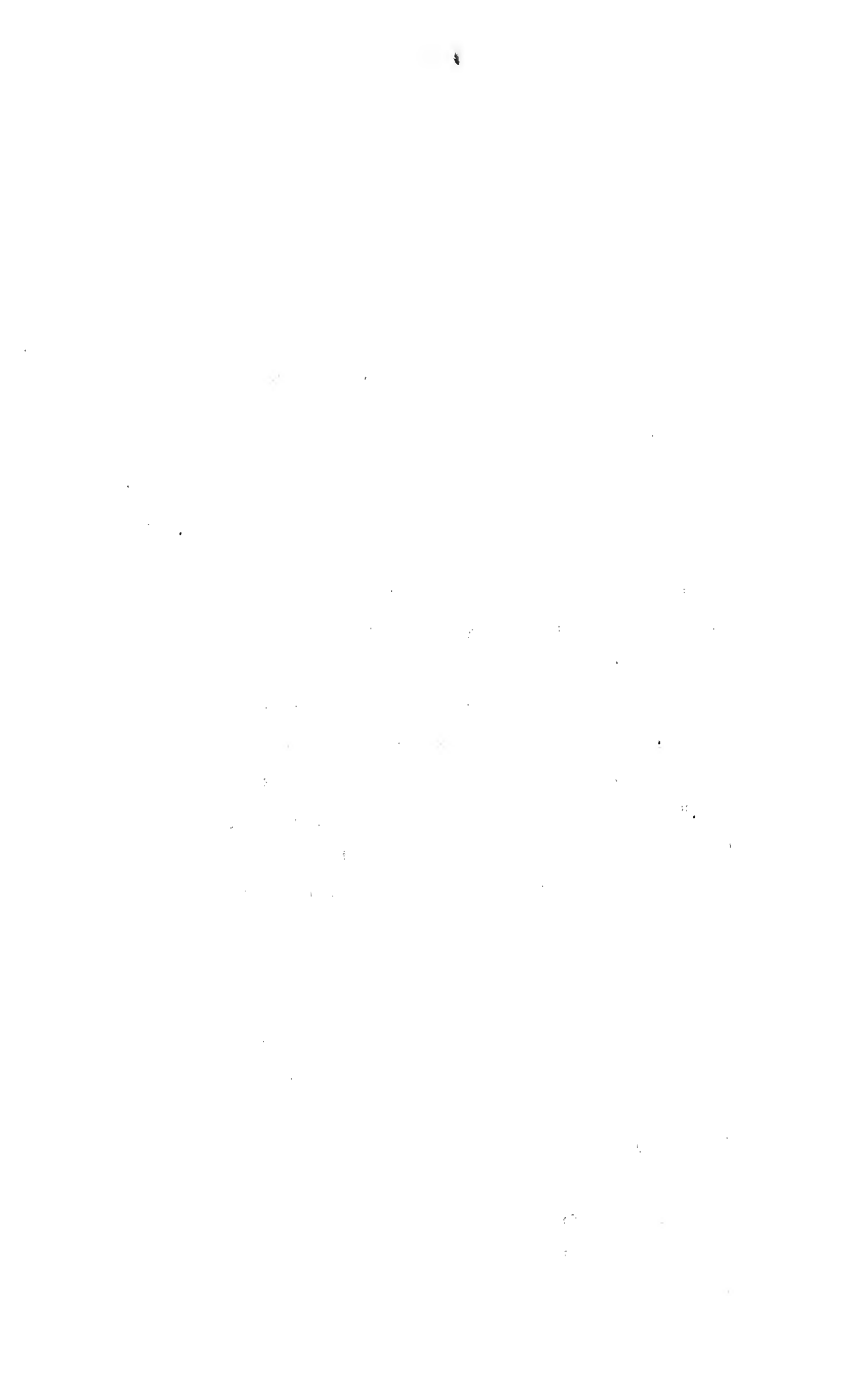
"If it should appear from the evidence that the driver of the automobile in which the plaintiff was riding was negligent in the management or operation of said automobile, and said negligence, if any, contributed toward bringing about the accident and injury, if any, to the plaintiff, nevertheless if you find from a preponderance of the evidence that the plaintiff was riding as a passenger in said automobile and had nothing to do with its management or control, the negligence, if any, of



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said driver cannot be imputed to the plaintiff so as to make him responsible for or chargeable with the negligence, if any, of such driver."

Defendant's instruction states a correct principle of law that is applicable to the facts of the case. The law is that "it is the duty of a guest or occupant of a motor vehicle other than the driver to exercise due care for his own safety, and if he fails in that duty he cannot recover for an injury to which his own negligence has contributed. Whether, under the particular circumstances, a plaintiff has acted as a person of reasonable and ordinary prudence is ordinarily a question for the jury." (42 C. J. (Motor Vehicles, Sec. 527) p. 853. *Italics ours.*) It will be noted that plaintiff's instruction ignores the foregoing principle of law. Plaintiff does not contend that defendant's instruction does not contain a correct principle of law. His argument is that defendant's instruction was improper because it singles out a certain fact in the evidence, namely, plaintiff's status as a passenger, and also that the instruction was argumentative in nature. We find no substantial merit in plaintiff's argument. Count I of the complaint alleges that plaintiff at the time of the occurrence "was in the exercise of ordinary care for his own safety," and he was obliged to prove this essential allegation. After giving plaintiff's instruction it was certainly proper for the trial court to give



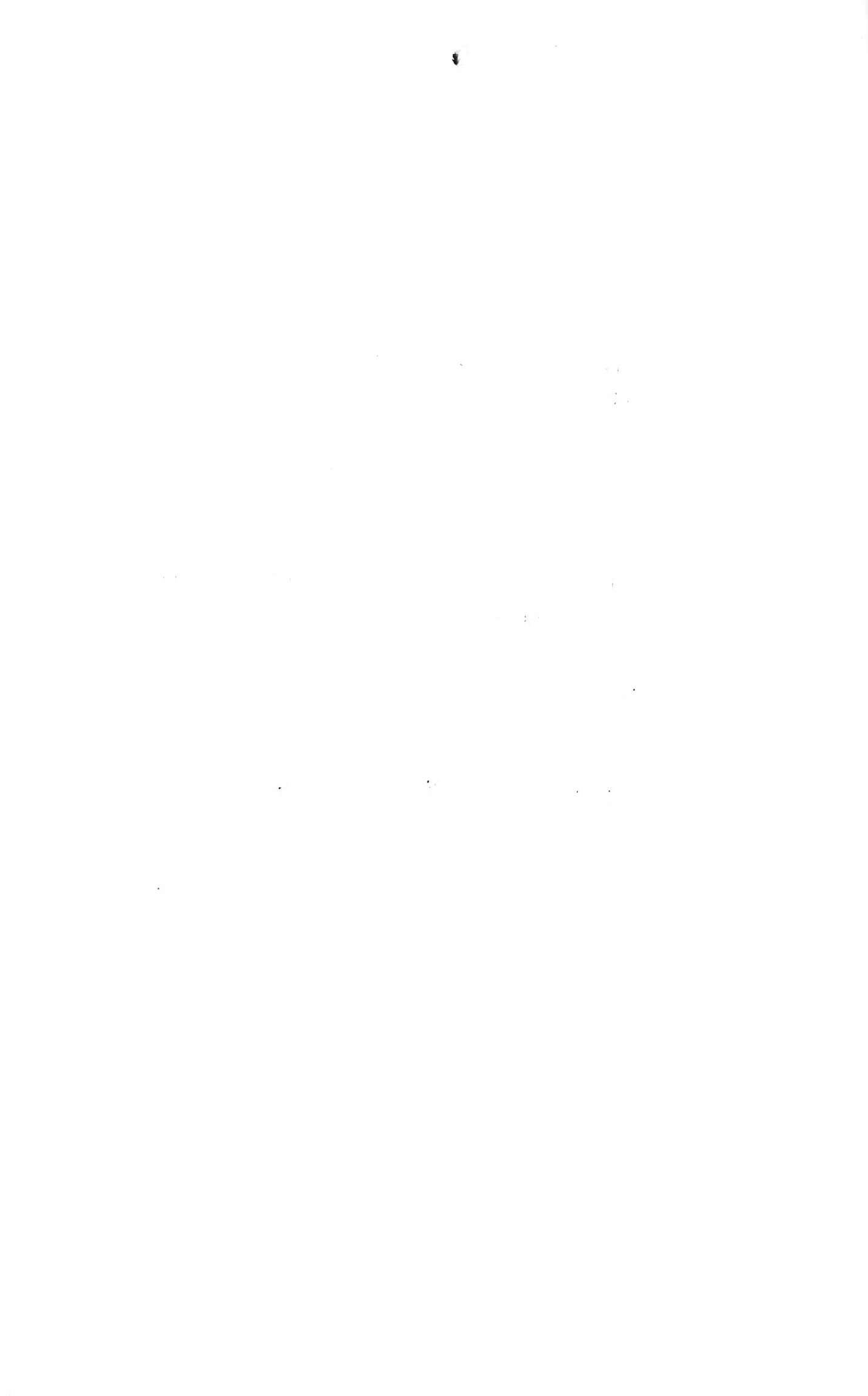
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defendant's instruction. Moreover, even if the argument of plaintiff as to defendant's instruction had any merit, it would also be applicable to plaintiff's instruction. Plaintiff cites no case that sustains his contention that the giving of defendant's instruction number nine constituted reversible error.

This case appears to have been well tried and we find no sufficient reason for reversing the judgment entered. The judgment of the Superior court of Cook county is therefore affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Schwartz, J., concur.



44879

MARGERY HORTON, a Minor, by  
FLORRIE FOREMAN, her mother  
and next friend,  
Appellant,  
v.  
ANNETTE MOZIN,  
Appellee.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

341 I.A. 66

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE  
COURT.

An action to recover damages for personal injuries sustained by plaintiff, a minor of the age of twelve years, on April 19, 1946, in the premises commonly known as 371-373 East 55th Place, Chicago, Illinois, owned and maintained by defendant as an apartment building. A jury returned a verdict of not guilty and the trial court entered judgment on the verdict. Plaintiff appeals.

Plaintiff's theory was "that plaintiff had been visiting with the minister of her church who occupied one of the first floor apartments and was leaving by the front exit about 6:00 o'clock in the evening; that at the top of a flight of five stairs leading down from the first floor landing, immediately behind the first step, on a level therewith in about the center thereof the floor was broken and defective and had been in that condition for two or three years; that as plaintiff walked through the door leading from the first floor landing to descend down the stairs the heel on her right foot got caught in the defective part of the hallway floor in back of the top of the first

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step; that this caused her to lose her balance and start zig-zagging and staggering, gaining momentum as she went down the stairs, till on the last step her feet slipped out from under her and she went through the glass panel at the bottom of the exit door leading from the hallway; that at the time it was dark in the hallway and there were no lights on."

Defendant's theory appears to be: "Regardless of the argument of theories, the jury quite naturally considered whether or not the accident did or even could have occurred in that manner [as plaintiff testified it occurred] or, on the contrary, whether or not something else occurred and that by reason of the plaintiff's own conduct, she finally was caused to and did go into and through the plate glass door with such force as to carry her completely through the door to the outside street."

Defendant argues that "it is perfectly obvious that the jury reached the sensible conclusion that there was a gross improbability in the evidence of the plaintiff." There were no eyewitnesses to the accident and plaintiff, alone, testified as to what occurred. Plaintiff further states that she was denied a fair trial.

Plaintiff contends that "the court erred in the admission of part of a statement allegedly impeaching the plaintiff." During the cross-examination of plaintiff defendant's counsel produced a document consisting of three pages and had it marked defendant's exhibit No. 5.



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Counsel then proceeded to interrogate plaintiff in reference to the document. Parts of the cross-examination are as follows: "Mr. Crowe [attorney for defendant]: In the fall of 1946, or to be more exact, on September 3, 1946, a man came out to see you and talk to you about how your legs were, didn't he? A. Yes, sir. Q. Did you talk to him about how your accident happened? A. Yes, sir. Q. And he wrote it down, didn't he? A. I saw him write; but I didn't know what he was writing down. \* \* \* Q. I believe you said you can read and write all right, and could then, couldn't you? A. Yes. Q. Didn't you tell this man that you were a student at the Berg Public School, Grade Six B? Mr. Karlin [attorney for plaintiff]: I object to any reading on the grounds that the document speaks for itself. The Court: She may answer. Mr. Crowe: Q. Didn't you tell him that? A. No, sir. Q. Did you tell him that on April 19, 1946, at about 6:00 o'clock P.M., 'I was walking down the front stairway leading from the first floor landing down onto the second entranceway from the west end of the building on 55th Place, when I slipped on one of the stone steps, and fell through the plate glass in the outside door?' Didn't you tell him that? A. No, sir. Q. You didn't tell him that? A. No, sir. Q. Did you tell him this: 'The reason I fell was because I slipped on something; I do not know what it was. I did not look to see what it was. I did not look at the stone. I did not look at the stairs either



before or after the accident to see if they were clean, dry, and did not notice if there was any substances on them.' Did you tell him that? A. No, sir. Q. Did you tell him this: 'I do not know what caused me to slip and fall; and my mother and stepfather do not know as far as I know'? Did you tell him that? A. No, sir.

\* \* \* Mr. Crowe: Did you tell him this: 'There was no defect about the steps, except that they are worn. I had not noticed this before. It was not the worn part in the step that caused me to fall'? A. No, sir. Q. You didn't tell him that? A. No, sir. Q. Why did you sign your name in ink to all three pages? A. He told me to sign. Q. Didn't you read it? A. No, sir. Q. You just sign anything anybody tells you to? A. No, sir." Upon redirect examination of plaintiff the following occurred: "Mr. Karlin: Do you remember when the man came that got this statement from you? A. Yes, sir. Q. Was he a white man or colored man? A. White. Q. When he came who was home? Who was home when he came? A. My sister and I. Q. You were twelve years old then, weren't you? A. Yes, sir. Q. Your sister was how old? A. Eight. Q. How old? A. She is nine now. She was six then. Q. Was your mother home? When the man was there, was your mother there? A. No, sir. Q. Was your stepfather there? A. No, sir. Q. Were there any grown people there besides the man that came to see you? A. No, sir. Q. You mean when this man walked in, didn't



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he ask you to find your mother, or anything like that?

A. No, he told me he was from Shavin's office. Q.

Shavin's office? A. Yes, sir. Q. Then this man sat down to talk to you? A. Yes, sir. Q. There was just you and your little sister there? A. Yes, sir. Q.

And he talked to you and wrote? A. Yes, sir. Q. When he got done, did he ask you to sign each page? A. Yes, sir. Q. Did you read the whole thing? A. No, sir.

Q. Did he read it to you? A. No, sir. Q. Did your mother come in before he left? A. No, sir. Q. You mean all this time the man from Shavin's office was there,

just you and your sister were there? A. Right." Thereafter, during defendant's case in chief, the following proceedings took place: "Mr. Crowe: Now, I would like to read to the jury a three page statement made by the plaintiff and marked defendant's exhibit 5 for identification. Mr. Karlin: I object to any part of the state-

ment at this time until the gentleman that wrote the statement is produced to testify as to the circumstances under which he took it; and the fact the statement is in the same condition now as it was at the time; and that he transposed exactly what she told him. The evidence thus far is that the things in that statement were not said by nor read to her, and that no proper foundation has been laid for it at this time. The Court: Overruled. Mr. Karlin: And the further objection that the reading of the whole statement is improper other than in that a





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foundation was laid for only a part of the purported impeachment. The Court: He may read those portions of the statement that he contends are impeaching. I will limit him to that of course. Mr. Crowe: Plaintiff's [defendant's] Exhibit Number 5. 'My name is Margery Horton. I am a student at Berg Public School, grade Six B.' I am just skipping through this. 'I was walking down - on April 19, 1946, at about 6:00 o'clock P.M., I was walking down the front stairway leading from the first floor landing down on the second entranceway from the west end of the building on 55th Place, when I slipped on one of the stone steps and fell through the plate glass in the outside door. I do not know what it was. I did not look to see what it was. I did not look at the stairs either before or after the accident to see whether they were clean, dry, and did not notice if there was any substance on them. I do not know what caused me to slip and fall; and my mother and stepfather, too, do not know, as far as I know. There was no defect about the steps, except they are worn. I had noticed this before. It was not the worn part in the step that caused me to fall.' Mr. Karlin: Motion to strike. Mr. Crowe: Each page here is signed at the bottom in ink, 'Margery Horton.' Mr. Karlin: I move to strike all those parts as read, on the same grounds as originally made. The Court: Denied." From the examination of plaintiff it appears that plaintiff expressly denied making the statements in defendant's



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exhibit 5 which defendant considered to be of an impeaching nature. It further appears that she did not know what the investigator had written into the statement; that she did not read the statement and it was not read to her; that she signed it without knowing its contents because she was informed that the investigator was from the office of her attorney, Shavin. It further appears that the statement was obtained from plaintiff when she was twelve years of age, and that the only other person present besides plaintiff and the investigator was plaintiff's sister, who was then a child of six years of age. Notwithstanding the testimony of plaintiff, no evidence was produced by defendant for the purpose of laying a foundation for the admission of the statement or any portions of the same. Plaintiff contends that admission of the evidence in question constituted serious error and that plaintiff was greatly injured thereby. This contention of plaintiff, in our opinion, is sound.

In the case of Belskis v. Dering Coal Company, 151 Ill. App. 85, the court stated (pp. 90, 91):

"\* \* \* It is sufficient to show the witness the paper or read it to him and question him concerning its genuineness. If he admits that it is in his handwriting, or that he has signed it in its present form, it may, at the proper season, be received in evidence." Chicago City Ry. Co. v. Matthieson, 113 Ill. App. 246. In Momence Stone Co. v. Groves, 197 Ill. 88, the court speaking of a like



paper signed by a witness and the admissibility of such paper in evidence said: 'Having admitted that he signed the paper and made the statements contained in it, it was then competent to be used for the only purpose which it was admissible, that he had made a different statement out of court from the one made on the trial.' In the case at bar the witness repudiated the paper in the form in which it was presented to him and denied that he had knowledge of its contents, and in the absence of any countervailing evidence with relation to the paper and the circumstances under which it was signed the paper was properly excluded." (Italics ours.)

Upon appeal the Supreme court approved the foregoing doctrine (Belskis v. Doring Coal Co., 246 Ill. 62), and in its opinion states (pp. 68, 69):

"\* \* \* In Terry v. State, (Texas,) 72 S. W. Rep. 382, it was held that where a witness denied that he had made certain statements contained in an affidavit, although he admitted he had signed and sworn to it as a whole but with the understanding that certain changes and additions had been made, it was error to permit the introduction of the affidavit in evidence without further proof that the statements were, in fact, made by him. In Illinois Central Railroad Co. v. Wade, 206 Ill. 523, relied on by plaintiff in error, the witness not only admitted that he had signed the paper, but it was evident also that he admitted it was unchanged and that he under-



stood the contents at the time he wrote his signature. In the present case the witness repudiated the paper in the form in which it was presented to him and denied that he had knowledge of its contents. In the absence of testimony to show the contrary the paper was properly excluded by the trial court."

The Supreme court has never overruled nor modified its ruling in the Beliskis case.

In the case of Altieri v. Public Service Ry. Co., 135 A. 786, decided by the Court of Errors and Appeals of New Jersey, that court had before it a situation similar to that presented in the instant case. The New Jersey court states (p. 787):

"The first ground upon which we are asked to reverse the judgment is that the trial court erred in excluding a written declaration of facts alleged to have been made previous to the trial by one Caironi, a witness called by the plaintiffs, and which was offered by the defendant to disprove certain testimony given by him on his direct examination. The statement was signed, but not written by him, and contained matters contradictory, to some extent, of the testimony theretofore given by him. Before the paper was offered his attention was called to these contradictory statements, and he denied having made any of them. No attempt was made to challenge the truthfulness of his denial. Neither the person who wrote out the alleged statement





nor any one else was called for that purpose. In this situation, we are of opinion that the exclusion of the paper was proper. If the defendant had desired to impeach the testimony of the witness while on the stand, it should have called the party who wrote the statement, or some one else having knowledge of the facts, to testify that it contained a true account of what the witness had then said. In the absence of such proof, the statement was not evidential for the purpose of impeaching the credit of the witness. Daum v. North Jersey St. Ry. Co., 69 N. J. Law, 5, 54 A. 221; Belskis v. Dering Coal Co., 246 Ill. 62, 92 N. E. 575, 20 Ann. Cas. 388; 40 Cyc. p. 2742, and cases cited."

It will be noted that the New Jersey court cites in support of its ruling Belskis v. Dering Coal Co., supra.

Defendant, in her answer to the contention of plaintiff, ignores the Belskis case and cites Plotkin v. Winkler, 323 Ill. App. 181. In our opinion in the Plotkin case we state (p. 185):

"\* \* \* Defendants argue that in order to make the statement admissible, plaintiff should have called the investigator, who supposedly heard Keller when the statement was prepared. No authority is cited for this contention. Moreover, the record indicates that plaintiff was not given an opportunity to call the investigator as a witness. The court refused to admit the



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statement in evidence and immediately thereafter proceeded to instruct the jury to return a verdict in favor of defendants." (Italics ours.)

We held in that case that the trial court did not have a right to direct a verdict in favor of the defendants, and we remanded the cause for a new trial. It appears from the opinion that our attention was not called to the decision of the Supreme court in Belskis v. Dering Coal Co., supra. In fact, it appears that the defendants in that case made only a feeble effort to justify their argument. The Belskis case, of course, is binding upon us. In our opinion in the Plotkin case we cite Illinois Central R. R. Co. v. Wade, 206 Ill. 523, but the Supreme court, in its opinion in the Belskis case, disposed of that case.

Plaintiff contends that "it was reversible error for defendant's counsel to ask prejudicial questions for impeachment purposes without thereafter producing supporting evidence to sustain the impeachment." During the cross-examination of plaintiff the following occurred:

"Q. Do you know a Mrs. Octavia Brown? A. Yes, sir. Q. You talked with her after your accident, didn't you? A. No, sir. Q. What was the answer? A. No, sir. Q. You didn't talk to her? A. No, sir. Q. Didn't you tell Mrs. Brown that you were jumping rope? Didn't you tell her that once? A. No, sir. Q. Didn't you tell her at another time that you were running? A.



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No, sir." No attempt was made by defendant to prove by Mrs. Octavia Brown or by any other person that the supposed statements to Mrs. Brown were actually made. Plaintiff contends that the foregoing cross-examination was highly prejudicial. There is merit in the contention.

In the late case of Gordon v. Checker Taxi Co., 334 Ill. App. 313, in passing upon a like cross-examination, the court states (pp. 318, 319): "Innuendoes involved in such questions are sometimes more damaging than an effort to prove the impeaching facts. When no witness is offered to impeach plaintiff and, therefore, no opportunity for cross-examination presented, the prejudicial effect springing from such questions cannot always be overcome, and results in an unfair trial to a plaintiff." Defendant admits that the foregoing opinion states a sound rule, but argues that in the instant case the questions asked were of no particular consequence and therefore should not cause a reversal of the judgment. This argument is not persuasive. Many pages of defendant's brief are devoted to convincing us that the occurrence did not take place as plaintiff testified, but resulting from her own fault; that "children are wont to hurry, skip along and at times run" and "that children chase each other." Counsel for defendant made the same kind of arguments in his address to the jury. We do not agree with defendant's contention that the questions asked were harmless in their nature.



Plaintiff contends that "the court erred in its rulings on the propriety of the argument by plaintiff's counsel." During that argument plaintiff's counsel discussed defendant's exhibit No. 5, parts of which had been admitted in evidence by the court for the purpose of impeaching plaintiff. During the argument the following took place: "Mr. Marlin: The curious thing to me is this: Why wasn't that man brought in to testify as to the circumstances under which he took this statement? Why wasn't that man brought in to say: 'That is what the child told me'? She said: 'I never told him that, and I never read it.' Why wasn't he brought in to testify that she had told him that? Why wasn't he brought in to say: 'That statement contains exactly what the girl told me'? Why wasn't he brought in to say that the mother was there? The child said she wasn't. The law says when the defendant fails to produce evidence that is available to him, and doesn't explain why it wasn't produced, you have a right to decide that it wasn't produced because it wouldn't have helped him. Mr. Crowe: That I object to. The law never was that. The Court: Objection sustained." Plaintiff contends that this ruling of the trial court "was prejudicial to the greatest possible degree to the plaintiff." We agree with this contention. As we have heretofore held, the admission of portions of the statement was a grave error, and in our opinion that error was aggravated by the instant ruling.





Plaintiff contends that instruction number 4, given by the court at the request of defendant, incorrectly stated the law; that the instruction was a directory one and the giving of it constituted reversible error. The instruction reads as follows:

"If the jury believe from the evidence, under the instructions of the Court, that the sole cause of the injury to the plaintiff was the manner in which the plaintiff walked or ran down the stairs and upon the hallway and into the door in question, if you believe from the evidence that the plaintiff did so negligently traverse said stairs and hall, then it is the duty of the jury to find the defendant not guilty."

This instruction informed the jury that if plaintiff was negligent in the manner in which she walked or ran down the stairs it was the duty of the jury to find defendant not guilty. At the time of the accident plaintiff was twelve years of age, and it is the settled law of this State that she was required to exercise the care and caution that a girl of her age, intelligence, capacity and experience would exercise under the same or like circumstances. (Wolczek v. Public Service Co., 342 Ill. 482, 497.) Defendant does not question this rule of law but states: "If the plaintiff had desired or thought it necessary to gain any advantage by reason of such rule, plaintiff could have given an instruction setting out the various conditions of care required of minors and adults.



Plaintiff did not see fit to give such an instruction" and therefore the court did not err in the giving of the instruction. As counsel for plaintiff argues, defendant's answer is based upon the novel theory that "there was supposedly a duty on plaintiff to give instructions either curing defendant's instructions or supplying whatever defects were present in them." Instruction No. 4 was a directory instruction and it is settled law that such an instruction must be complete within itself and cannot be cured by any other instruction in the series. The attorney for defendant has had years of experience in the trial of personal injury cases and it is difficult to believe that he makes the answer to plaintiff's contention seriously. The counsel, of course, cites no authority in support of his answer. The instruction is clearly an erroneous and prejudicial one. Plaintiff contends that several other directory instructions given at the request of defendant state the law incorrectly, but in view of our ruling as to instruction No. 4 these instructions are not likely to be given upon a second trial and we will not lengthen this opinion by passing upon them.

We are satisfied that plaintiff has not had a fair trial and that justice requires a reversal of the instant judgment.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE  
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Schwartz, J., concur.



44882

ANNA OLBRIG,

Appellee,

v.

B. J. SHANLEY,

Appellant.

APPEAL FROM

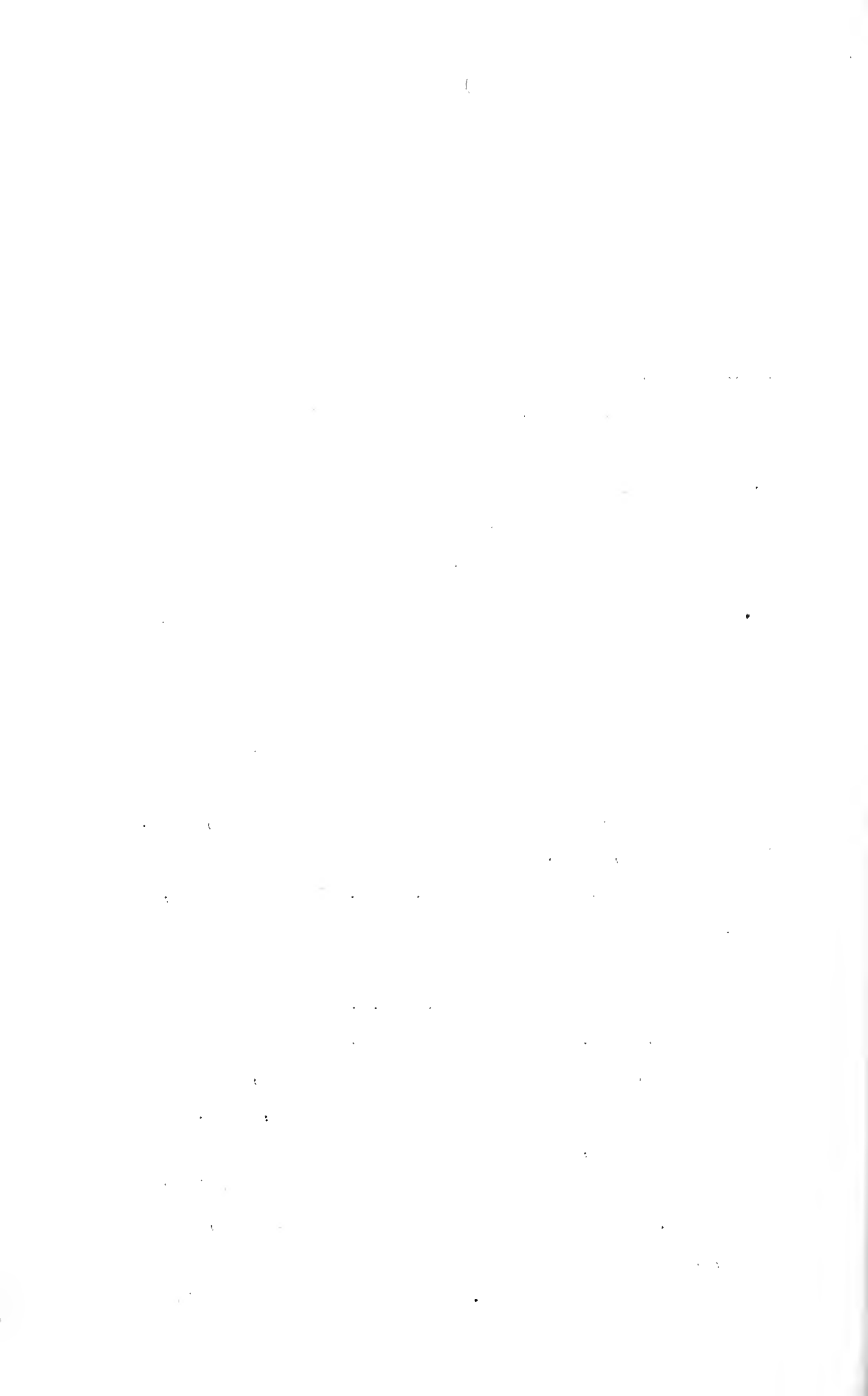
MUNICIPAL COURT

OF CHICAGO

341 I.A. 67

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a forcible entry suit commenced by plaintiff against defendant, the court entered an order by agreement of the parties on May 7, 1948, finding the defendant guilty of unlawfully withholding possession, ordering restitution of the premises, and staying the writ to January 15, 1949. On December 28, 1948, the court entered an order, staying the writ of restitution to May 7, 1949. On December 29, 1948, the plaintiff moved to set aside this order on the ground that the only notice she had received was a notice slipped under her door about 11:00 A.M. on the morning of December 28, 1948. On January 3, 1949, an order was entered by agreement, vacating the order of December 28, 1948 and staying the writ of restitution to February 28, 1949. On February 24, 1949, the motion of the defendant in the nature of a writ of error coram nobis was filed. This was in case 48 M 55922. It appears that there was another suit, 48 M 55063, for forcible entry and detainer, involving a garage connected with the premises. There is no transcript of the



proceedings with respect to suit 48 M 55063. After a hearing judgment for possession of these premises was entered by the court. This suit was consolidated with 48 M 55922. The motion for writ of error coram nobis sets forth that the agreed order was obtained upon the false representation that the premises had been sold by plaintiff, when as a matter of fact, they had not been sold. It is charged with respect to the garage that there was also a misrepresentation in regard to registration of the garage service as part of the housing accommodations furnished by plaintiff. It is further alleged that the misrepresentation induced the defendant to agree to the order for possession of the garage. Plaintiff answered the motion, denying the various allegations, alleging that the proceeding for possession was predicated on a 5-day notice for nonpayment of rent, and that the court entered judgment for possession after full and complete hearing.

The record filed by the defendant is scanty. The court in its decision relied on the proposition that the writ of error coram nobis does not lie in a forcible entry and detainer proceeding. Plaintiff, however, asserts that the facts set forth in the petition are inadequate to sustain a writ of error coram nobis and cites in support thereof People v. Noonan, 276 Ill. 430, Jacobson v. Ashkinazo, 249 Ill. App. 484, Elliott v. Greene, 172 Ill. App. 213. It is not necessary for us to decide in this case whether a writ of error coram nobis will lie. We think that the motion filed is inadequate and the record, itself, wholly inadequate to sustain the motion of the defendant. Defendant alleges that in





-3-

November 1947 he received notice that the premises had been sold and that relying on said false representation, he entered into the agreed order of May 7, 1948, some five months after the purported notice of sale. The staying of the writ of restitution to January 15, 1949 is in itself a clear indication that the basis of the order was the agreement for this long stay of the writ. It also appears from the record, scanty as it is, that defendant knew on December 28, 1948 that plaintiff was still the owner of the premises, because on that date he served notice on Anna Olbrig that he would move to extend the stay of execution. Even at that time he did not question the entry of the agreed order, although more than seven months had elapsed. Under such circumstances, even assuming that the court had jurisdiction to vacate the order on the petition for a writ of error coram nobis, the petition was inadequate. ✓

The purpose of the writ of error coram nobis at common law and of the motion substituted for it by Section 72 is to bring before the court rendering the judgment matters of fact not appearing of record, which if known at the time the judgment was rendered, would have prevented its rendition. (Linehan v. Travelers Ins. Co., 370 Ill. 157; Chapman v. North American Life Insurance Co., 292 Ill. 179.) We hold that the issue as to whether plaintiff's notice of November 25, 1947 was true or false could have been raised by defendant



-4-

when the judgment was rendered May 7, 1948, and that such fact was then known to the defendant. It is obvious from an examination of this record that defendant did not file this motion until he had exhausted all possibility of obtaining any further stays of the writ of restitution.

Judgment affirmed.

Friend, P. J., and Scanlan, J., concur.



44989

PETER R. LOWE,  
Appellee,

v.

ED FRANKLIN and SUSIE  
FRANKLIN, his wife,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

341 I.A. 67

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE  
COURT.

On May 20, 1949, the plaintiff obtained a judgment by default against the defendants for failure to "comply with the order of this court entered herein requiring said defendants to file an affidavit of merits of defense in this cause." In the transcript of the record in this cause there appears an amended answer filed May 9, 1949, according to the stamp of the clerk endorsed on the back thereof. This answer was filed within the time fixed by the court. As long as this answer remained on file and not stricken, judgment could not be entered by default for want of answer.

Judgment reversed and cause remanded.

Friend, P. J., and Scanlan, J., concur.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1950

Term No. 50F7

Agenda No. 8

MILDRED NOLAN,

Plaintiff-Appellant,

vs.

ELMER NOLAN,

Defendant-Appellee.

)  
)  
) Appeal from the  
) Circuit Court of  
) Madison County,  
) Illinois.

341 I.A. 68

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CULBERTSON, J.

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This is an appeal from a decree of the Circuit Court of Madison County granting Appellee, ELMER NOLAN (hereinafter called defendant) a divorce from Appellant, MILDRED NOLAN (hereinafter called plaintiff) on grounds of habitual drunkenness, and denying the plaintiff a divorce on either of the grounds set forth in her complaint, of extreme and repeated cruelty and habitual drunkenness.

The decree was entered following a bitterly contested divorce case heard before the Court, in which many witnesses testified on behalf of both plaintiff and defendant. The plaintiff in her complaint charged her husband with extreme and repeated cruelty and with habitual drunkenness. The defendant in his counter-claim for divorce charged plaintiff with habitual drunkenness and with adultery.

There is no public interests or benefit to the litigants which would be subserved by reviewing in detail the evidence heard in this cause. There was evidence on behalf of both plaintiff and defendant on the issue of habitual drunkenness. The Court below heard and saw the witnesses and was in much better position than is the Appel-





late Court to determine the credibility and sincerity of such witnesses (HANDRICH vs. HANDRICH, 339 Ill. App. 151).

In this case a jury was waived and the cause was tried by the Court sitting as a jury. Under the circumstances the Court was the sole judge of the credibility of the witnesses and the weight to be given the testimony (ANDREWS vs. MATTHEWSON, 332 Ill. App. 325).

The finding of the Court below under such circumstances should be sustained unless it is contrary to the manifest weight of the evidence (BRADY vs. METROPOLITAN LIFE INS. CO., 331 Ill. App. 114).

We have reviewed the Record on the issue of extreme and repeated cruelty and believe that the Court properly concluded that the plaintiff failed to prove her charge of extreme and repeated cruelty under the law. Similarly, we believe she failed to prove her charge of habitual drunkenness as a matter of law. The sole question remaining is whether or not the Court below was justified in finding the plaintiff guilty of habitual drunkenness under the evidence as presented in the Trial Court. The daughter of plaintiff, among others, testified as to the addiction of plaintiff to intoxicating liquor and there was substantial evidence that plaintiff was habitually addicted to the use of intoxicating liquor and habitually intoxicated. While we recognize that there was contradictory evidence on this issue it is not the province of the Court on appeal to substitute its judgment for that of the Trial Court and we cannot say, as a matter of law, that the finding of the Court below was contrary to the manifest weight of the evidence.

The decree of the Circuit Court of Madison County will, therefore, be affirmed.

Affirmed.

Bardens, P.J. and Scheineman, J. Concur.

(Abstract only)

FILED

MAY 13 1950

[illegible]

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

May Term, A. D. 1950

General No. 9685

Agenda No. 3

Lena Nemeth, as Administrator )  
of the Estate of Gabor Nemeth, Jr., )  
deceased, )

Plaintiff-Appellant, )

-vs-

Roy Lynch,

Defendant-Appellee. )

Appeal from

Circuit Court of

Vermilion County.

341 I.A. 66

DADY, J.

This suit was brought by plaintiff-appellant, Lena Nemeth, as Administrator of the Estate of Gabor Nemeth, Jr., deceased, to recover alleged damages because of the death of the decedent, and damages to the automobile of decedent.

The defendant filed an answer denying negligence on his part, and filed a counter-claim for damages to his truck.

The complaint charged the collision was caused by defendant negligently driving his truck northerly across the center line and on the westerly half of the pavement, and at an excessive rate of speed. The counter-claim charged the collision was caused by counter-defendant negligently driving his automobile southerly across the center line and on the easterly half of the pavement.

A jury returned a verdict which found the defendant Lynch not guilty, and which found the counter-defendant guilty and assessed the damages of Lynch at the sum of \$750.00.

100-100000

George J. Lynch

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and

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A jury returned a verdict which found the defendant guilty of the crime charged.

not guilty, and which found the counter-claimant guilty and assessed

the damages of Lynch at the sum of \$100.00.

Judgment was entered on the verdict in favor of Lynch. The plaintiff-appellant brings this appeal from such judgment.

The only contentions of the plaintiff-appellant are that the judgment should be reversed because the verdict was contrary to the manifest weight of the evidence, and because the court erred in giving certain instructions at the request of the defendant.

The collision occurred on December 21, 1941, about 8:15 p.m. The decedent, Gabor Nemeth, Jr., was driving his automobile southerly on a 22 foot concrete highway. The defendant Lynch was driving his truck northerly on the same highway. The two vehicles collided.

The decedent was aged 21 years. Robert Cook and his sister, Ruth Cook, were riding with decedent, - Ruth riding on the front seat between the two men.

Because of injuries received in the collision, Gabor Nemeth, Jr., died instantly, and Ruth Cook died while being taken to a hospital.

Wendell Thieben was the only person riding in the truck with Lynch. Lynch was not permitted to testify because of his incompetency under the statute. The only eye witnesses were Robert Cook, who testified for the plaintiff, and Wendell Thieben, who testified for the defendant.

Robert Cook testified that he first noticed the head lights of the approaching truck when the truck was about "a city block" distant, that Gabor Nemeth, Jr., was then driving and continued driving southerly at a speed of about 35 miles per hour on the westerly half of the road, that when the truck was about 60 feet distant he saw the truck "start across the road," cross the center black line, that the collision then took place on the westerly

Johnson was not on the road at the time of the collision.

The first collision occurred at the intersection of the road and Johnson's.

The only conclusion of the collision is that it occurred at the intersection.

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testified for the defendant.

Robert Cook testified that he observed Johnson's car at the intersection.

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The witness stated that he observed Johnson's car at the intersection.

half of the pavement, and that he had no judgment as to the speed of the truck, but it seemed "awfully fast."

Wendell Thieben testified that Lynch was driving northerly on the east half of the pavement at a speed of about 35 or 40 miles per hour, that as the Hemeth car approached it was going about 60 or 70 miles an hour, and when about 20 or 25 feet distant it crossed the black line and the collision occurred about two feet to the east of the black line.

The testimony of the other witnesses covered principally the location and condition of the automobile and truck after the accident.

After due consideration of all of the evidence, it is our opinion that we cannot properly say that the verdict is against the manifest weight of the evidence.

As to the propriety of the instructions given to the jury, we consider it sufficient to say that it is our opinion that there was no reversible error in the giving of instructions.

The judgment of the trial court is affirmed.

Affirmed.

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Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

May Term, A.D. 1950

1662

General No. 9688

Agenda No. 4

HERBERT H. DeFRATES, Administrator of  
the Estate of Herbert F. DeFrates,  
deceased,  
Plaintiff-Appellant,  
vs.  
W. C. ROWLAND, Public Administrator in  
and for Hancock County, Illinois,  
Administrator of the Estate of Loren  
Haigh, deceased,  
Defendant-Appellee.

341 I.A. 631

Appeal from  
Circuit Court of  
Hancock County

O'Connor, J.

The facts of this case arose out of an automobile collision which occurred on May 24, 1947, on State Highway No. 9 between Dallas City and Niota in Hancock County. Plaintiff-appellant's intestate was driving on that highway in a westerly direction toward Niota. Defendant-appellee's intestate was driving on the same highway toward Dallas City in an easterly direction. The night was rainy and foggy. At a point on the highway some two and one-half miles from Niota and three and one-half miles from Dallas City where a slight downgrade in the road enters a gradual curve, the cars driven by the two intestates came into a violent collision. Both the drivers and several of their passengers were killed or died shortly thereafter, in what one witness stated was the worst accident he had ever seen. The plaintiff-appellant as administrator of the Estate of Herbert F. DeFrates, deceased, brought suit in the Circuit Court of Hancock County,

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Board of Directors of the  
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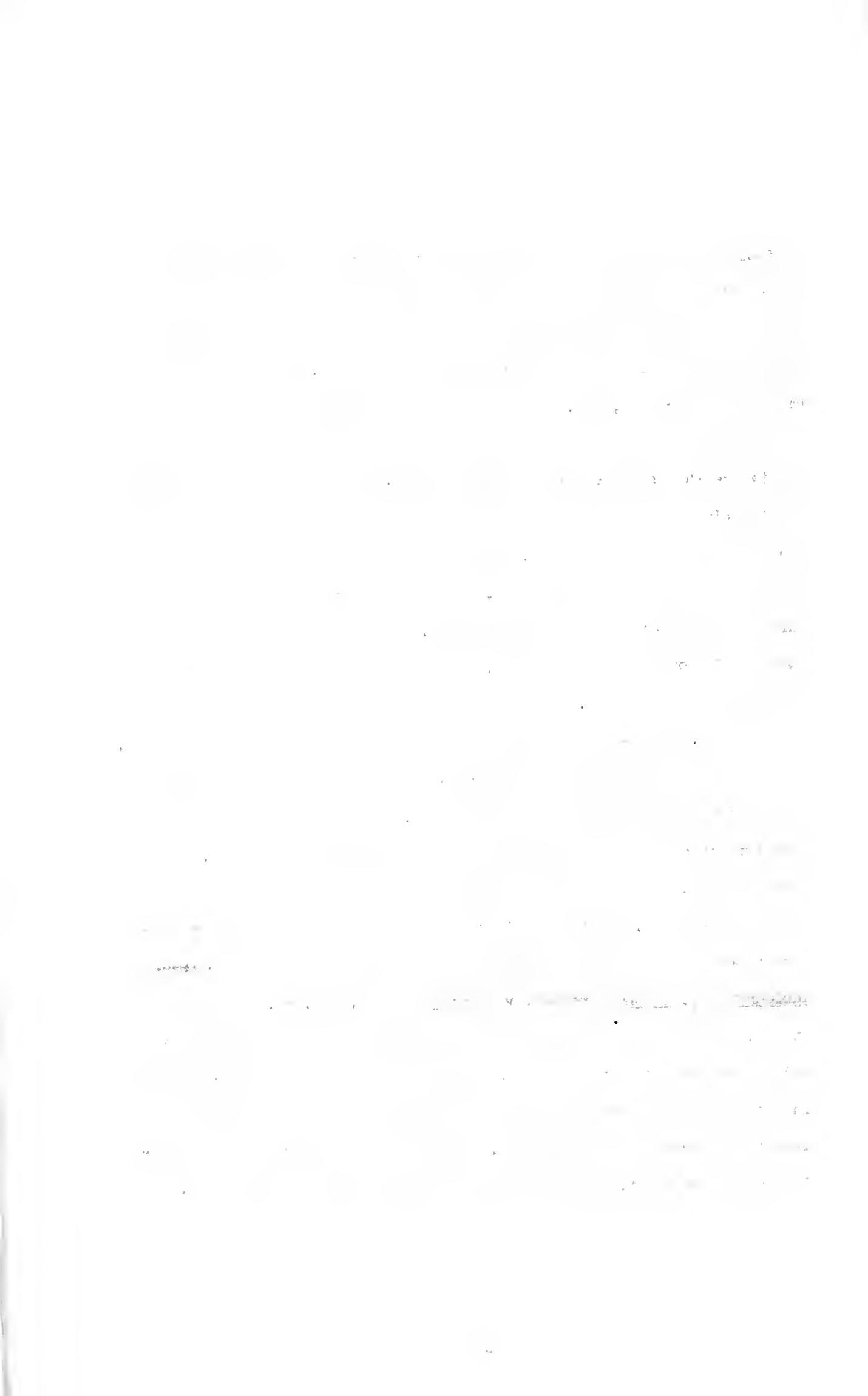
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For the sum of \$100.00  
in full for the purchase of  
the land situated at the  
corner of Broadway and  
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City, for the purpose of  
erecting a building for the  
City of New York, to be  
used as a City Hall.  
This receipt is given in  
full for the sum of \$100.00  
and no other receipt is  
required.

Illinois, charging the defendant-appellee's intestate with negligent conduct in that the latter was driving at an excessive rate of speed; that he was driving on the left or north side of the highway; that he failed to look at, see, and observe the highway in front of him and that he failed to look at, see, and observe the car driven by plaintiff-appellant's intestate and that his car was overloaded by reason of which negligence the collision and resultant injuries to plaintiff and plaintiff-appellant's intestate occurred. The defendant denied all of these allegations and filed a counterclaim, the allegations of which plaintiff denied. The matter was tried before a jury. The jury returned a verdict of not guilty on both complaint and counterclaim. The court denied plaintiff-appellant's motion for a new trial, judgment was entered on the verdict and this appeal resulted. Defendant filed no cross-appeal.

Plaintiff-appellant relies upon three major grounds for reversal.

The first ground relied upon is that the verdict of the jury was against the manifest weight of the evidence. The court is well acquainted with the propositions of law cited by both parties in this regard. This court will not substitute its judgment for that of the jury in deciding a question of fact. If the jury's verdict is manifestly against the preponderance of the evidence, however, that verdict may not stand. ~~Mutual Accident Assn. of the Northwest v. Simons~~, 69 Ill. App. 94. In the case at bar, there was only circumstantial evidence to guide the jury on the main issue developed by the proof: whether or not the defendant-appellee's intestate was or was not driving on the wrong side of the road at and immediately prior to the collision. There were many witnesses who testified as to the position of the cars after the collision had occurred.



There were no eye witnesses as to the collision itself. The majority of those involved were killed by the accident, some were in the armed services at the time of trial and the remaining parties involved were unable to remember anything of what happened. Plaintiff-appellant relied on seventeen witnesses who testified that the cars were on the north side of the highway after the impact to prove that the impact must have occurred in the north lane. There were two witnesses, however, who placed the car of the defendant-appellee's intestate at the center line of the road or on the proper side of the road after the collision. We are not unmindful that the number of witnesses should be considered in determining wherein the preponderance of the evidence lies. Andreievk v. Chicago & E.I.R.R.Co., 150 Ill. App. 539; <sup>1919</sup>E.J. & E.Ry. Co. v. Lawlor, 229 Ill. 621. Certainly the number of witnesses alone is not conclusive. Jones v. Esenberg, 299 Ill. App. 551. It has been established by many decisions in the courts of this state that "preponderance of the evidence" means the weight of the testimony and not the number of witnesses per se., Chenoweth v. Burr, 242 Ill. 312. The fact that plaintiff-appellant had the greater number of witnesses does not necessarily imply a preponderance of the evidence in his favor. Rafferty v. Rafferty, 337 Ill. App. 277. Credibility, opportunity for knowledge, demeanor on the stand and like elements also enter into the determination of the preponderance of the evidence. Brown v. City of Streator, 324 Ill. App. 659.



In this case circumstantial evidence alone was adduced. The evidence as to the circumstances varied. We cannot say that the decision of the jury was manifestly against the preponderance of the evidence and should, therefore, be set aside. The jury had an opportunity to see the witnesses and observe their demeanor and bearing. The jury also had an opportunity to examine the photographs of the cars which were introduced into evidence. They could have believed either of the parties but since their decision was not manifestly wrong, it will not be disturbed on this appeal.

Plaintiff-appellant as a second ground for reversal relies on certain remarks of counsel for the defendant-appellee in final argument and the actions of the court thereon. The remarks need not be set forth in full. Counsel for plaintiff-appellant objected to the remarks and in one instance moved to strike the remarks. The court made no ruling on these objections, merely stating "proceed, gentlemen", and "proceed with the argument". Counsel for plaintiff-appellant sought no ruling of the court upon his objections and obtained none. In such a case plaintiff-appellant has no right to raise the question of the propriety of defendant-appellee's remarks on appeal. The fact that objections are not passed on by the court is not necessarily equivalent to overruling them. Shultz v. Shultz, 229 Ill. 420. Mere objections to allegedly improper remarks of counsel are ineffectual where not pressed upon the attention of the judge and a ruling obtained. North Chicago St. R.R.Co. v. Southwick, 165 Ill. 494. Sturonois v. Morris, et al., 177 Ill. App. 514. In Peterson v. Pusey, 237 Ill. 204, the court stated:

The first part of the report deals with the general situation of the country and the progress of the work. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the conclusions reached.

The second part of the report deals with the financial aspects of the work. It gives a detailed account of the income and expenditure of the organization and shows how the funds have been used. It also gives a statement of the assets and liabilities of the organization.

The third part of the report deals with the personnel of the organization. It gives a list of the staff and their duties and shows how the work has been organized. It also gives a statement of the salaries and other expenses of the staff.

The fourth part of the report deals with the results of the work. It gives a detailed account of the various projects and the results achieved. It also gives a statement of the progress made in each of the various fields of work.

The fifth part of the report deals with the conclusions reached. It gives a summary of the work done and the conclusions reached. It also gives a statement of the recommendations made.

The sixth part of the report deals with the appendix. It gives a list of the various documents and reports which have been referred to in the main body of the report. It also gives a list of the various names and places mentioned in the report.



"A party litigant can only complain (of improper remarks of counsel during closing argument) where he has objected to and obtained a ruling of the court and excepted to it, or excepted to a refusal of the court to act. (citations.)" (Emphasis supplied.)

The Peterson case, supra, was cited by this court with approval in Kelley v. Call, 324 Ill. App. 143. We hold plaintiff-appellant to have waived his objections to opposing counsel's remarks by his failure to seek and obtain a ruling thereon in the court below.

As a third ground for reversal, plaintiff-appellant urges that the lower court erred in that it gave one instruction defining negligence and stating that the definition given applied to the conduct of the plaintiff and defendant in the suit, and later instructed the jury that the plaintiff and defendant were the respective administrators. Plaintiff-appellant's position is that since the defendant acted only in his representative capacity as administrator under the above instructions plaintiff-appellant could not possibly recover because there was no proof on the trial that the defendant administrator was negligent and that in substance the above instructions misled the jury into deciding the case on the presence or absence of negligence on the part of the representative and not the real parties.

Considering the instructions as a whole, however, the court holds that plaintiff-appellant's position is without merit. Numerous other instructions established that it was the defendant-appellee's intestate's negligence and plaintiff-appellant's intestate's freedom from contributory negligence that were the true issues for the jury to decide. The respective deceased parties were either referred to as "intestate" or by their full names. The instructions as a series properly informed the jury as to the



law and were not misleading. Aldridge v. Morris, 337 Ill. App. 369.

There being no error, the judgment of the Circuit Court of Hancock County will be affirmed.

Affirmed.

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44575

REILLY TAR & CHEMICAL CORPORATION,  
a corporation of Illinois (now  
THE REILLY CORPORATION),

Plaintiff, Appellant,

v.

FRANCIS J. LEWIS,

Defendant, Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

341 I.A. 502

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is the fourth appeal in this case. The opinions in the previous appeals appear in 301 Ill. App. 459, 326 Ill. App. 84 and 326 Ill. App. 117, in which the case has been fully set forth. This appeal is from a judgment entered on a verdict against plaintiff.

Where but one reasonable inference can be drawn from the essential undisputed facts, the question becomes one of law for the court. Plaintiff maintains that from the essential undisputed facts it was the duty of the court to enter a judgment in its favor notwithstanding the verdict and that such a judgment should be entered in this court. In the previous opinions we disposed of certain defenses. In the instant trial the single issue presented to the jury for its determination was whether the contract was entered into between plaintiff and defendant or between the International Combustion Engineering Corporation and the defendant. In the previous appeals we held that an issue of fact was presented. In the opinions we discussed the evidence. We cannot agree with plaintiff that but one reasonable inference can be drawn



from the facts shown by the record. Our view, as in the previous appeals, is that there was an issue of fact as to whether defendant contracted with plaintiff or with the engineering corporation. Adhering to the views previously expressed, we are of the opinion that the court was right in overruling plaintiff's motion for judgment notwithstanding the verdict.

Plaintiff asserts that the court erred in overruling its motion for a new trial. Under this point it argues that the court erroneously excluded the testimony of Mr. Orr that in the conference held in New York in February, 1928, after the conference of the previous day, Mr. Ryan or Mr. Lewis told Mr. Orr that it had been agreed to pool the interests of plaintiff and the Lewises. We agree that this testimony was competent. However, plaintiff was not harmed by its exclusion as in the subsequent examination of the witnesses the facts were fully developed. We are of the opinion that plaintiff's objections shown in paragraphs 14.01, 14.02 and 14.12 of its motion for a new trial should have been sustained. The trial judge did not err in ruling adversely to plaintiff on the questions and answers in paragraphs 14.03, 14.04, 14.05, 14.06, 14.08, 14.09, 14.10, 14.11, 14.13, 14.14, 14.15 and 14.16. In paragraph 15 of the motion plaintiff states that defendant improperly persisted in saying to the jury that the original of defendant's Exhibit 19D, dated April 27, 1929, was on stationery of the International Combustion Engineering Corporation. The transcript shows that while counsel for





defendant was reading a copy of the letter interrogating a witness, he interjected: "I might say for your information that the original letter was on the stationery of the International Combustion Engineering Corporation." This procedure was improper. The record shows that on objection of counsel for plaintiff the court remarked that the question might stand and that the interrogator should proceed. The jury would understand that the statement objected to was that of counsel. Subsequently, the jury was instructed that in considering the case and arriving at their verdict that they should not take into account or be influenced by any statement or argument of counsel unless based upon and fairly deducible from the evidence. While we do not agree with all the rulings, it is our view that in the admission and exclusion of evidence the parties were not prejudiced.

In arguing for a new trial plaintiff further contends that the court erred in overruling its objections to various exhibits and documents offered by defendant. Defendant's Exhibits 3C, 13C, 14C, 15C, 16C and 23D were held to be admissible in evidence in 326 Ill. App. 117. We are of the same opinion. The trial judge did not err in admitting defendant's Exhibits 6C, 7C, 8C, 9C and 18C. These exhibits were material to the issue and tended to support defendant's contentions.

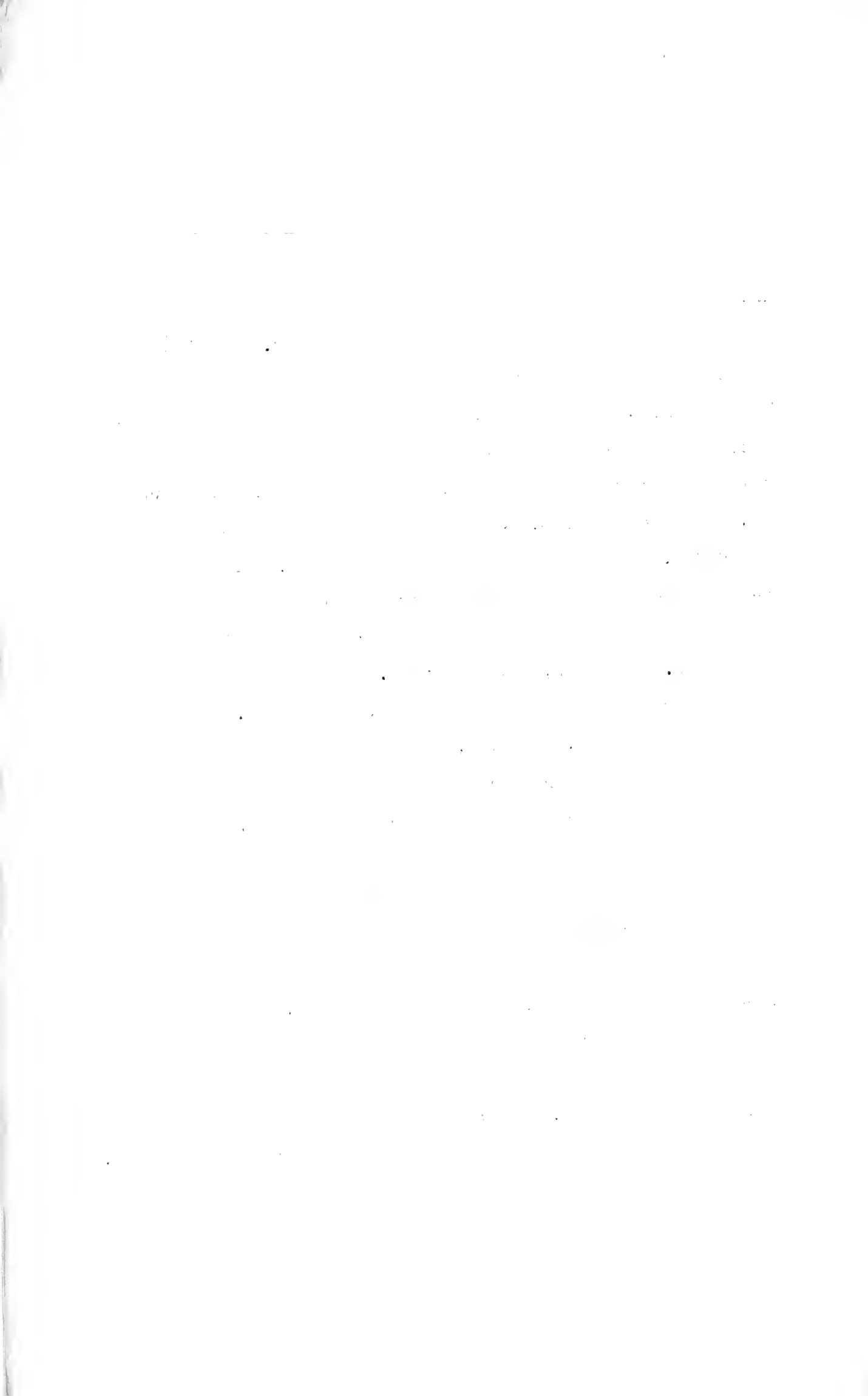
As a ground for the granting of a new trial plaintiff also urges that the court erred in refusing to give proper instructions tendered by it, in altering certain of its tendered instructions and in giving certain instructions requested by defendant. The court gave 33 instructions,



17 requested by plaintiff and 18 by defendant. The tendered instructions were discussed by court and counsel prior to the argument. In its motion for a new trial and here plaintiff states that the court erred in refusing to give to the jury instructions Nos. 10, 10A, 11, 12, 16, 20, 21 and 22. We note that each instruction the court refused to give is marked "Refused." Instructions Nos. 20, 21 and 22 were not refused by the court. They were withdrawn by plaintiff. It is not in a position to complain about them. The court did not err in refusing to give plaintiff's tendered instructions Nos. 10, 10A, 11, 12 or 16. Tendered instruction No. 16, relating to the depositions, was proper. The refusal to give it, however, was not harmful to either party. Out of the presence of the jury the court sustained plaintiff's motions to withdraw certain defenses. Plaintiff asserts that when the court failed to instruct the jury that such defenses were withdrawn, the jury could consider and base their verdict upon evidence which had been introduced by defendant in attempting to maintain the defenses of fraud, rescission, and that the agreement of May 25, 1928, was in lieu of provisions in the stock sale contract. As we have observed, the tendered instructions were withdrawn with the consent of plaintiff. The argument of counsel and the given instructions confined the issue to be passed upon by the jury. In deciding the issue presented the jury was not called upon to consider and did not consider the alleged defenses of fraud, rescission, or that the agreement of May 25, 1928, was



17 requested by plaintiff and 18 by defendant. The tendered instructions were discussed by court and counsel prior to the argument. In its motion for a new trial and here plaintiff states that the court erred in refusing to give to the jury instructions Nos. 10, 10A, 11, 12, 16, 20, 21 and 22. Instructions Nos. 20, 21 and 22 were not refused by the court. They were withdrawn by plaintiff. It is not in a position to complain about them. The court did not err in refusing to give plaintiff's tendered instructions Nos. 10, 10A, 11, 12 or 16. Tendered instruction No. 16, relating to the depositions, was proper. The refusal to give it, however, was not harmful to either party. Out of the presence of the jury the court sustained plaintiff's motions to withdraw certain defenses. Plaintiff asserts that when the court failed to instruct the jury that such defenses were withdrawn, the jury could consider and base their verdict upon evidence which had been introduced by defendant in attempting to maintain the defenses of fraud, rescission, and that the agreement of May 25, 1928, was in lieu of provisions in the stock sale contract. As we have observed, the tendered instructions were withdrawn with the consent of plaintiff. The argument of counsel and the given instructions confined the issue to be passed upon by the jury. In deciding the issue presented the jury was not called upon to consider and did not consider the alleged defenses of fraud, rescission, or that the agreement of May 25, 1928, was



in lieu of provisions in the stock sale contract. It is our view that plaintiff was not harmed by the alterations in given instructions Nos. 5 and 10. We cannot agree with plaintiff that the court erred in giving to the jury, at the request of defendant, instructions Nos. 20, 22, 30, 32 and 33.

Plaintiff insists that the court erred in giving to the jury the following form of verdict to be used if the jury returned a verdict in favor of plaintiff: "We the jury find the issues for the plaintiff and assess the plaintiff's damages at the sum of \$173,600.00." In our opinion filed December 13, 1944, we intended the parties to understand that if there was no legitimate question of fact as to the payments, there would be no necessity for the jury to be instructed on the measure of damages, or that the jury make any finding as to the damages. We agree with plaintiff that in the absence of such a dispute the instruction submitted (should the jury find the issues for plaintiff) should have read: "We the jury find the issues for the plaintiff and against the defendant." However, plaintiff was not injured by the giving of the instruction in the form in which it was given. The jury knew that if they found the issues for the plaintiff that the damages to be awarded, whether found by the court or by them, would be substantial. We have read all the instructions and are satisfied that they fairly and correctly stated the law of the case.





Finally, plaintiff maintains that the verdict is manifestly against the weight and clear preponderance of the evidence. On reviewing the record of the 1942 trial we stated that we were satisfied that the judgment was contrary to the manifest weight of the evidence. In the previous opinions various defenses were removed from consideration. Our directions as to the method of arriving at the damages were given in a desire to remove from the consideration of the jury all questions except the one as to the identity of the contracting parties. The trial judge and counsel for the parties confined the case to that issue. Before the case was argued to the jury the court cautioned the attorneys that they were to confine their remarks to the one issue and they adhered to his request. The first trial resulted in a directed verdict for defendant. The three subsequent trials resulted in verdicts for defendant. The last trial was fair in every respect and without reversible error. Having carefully reviewed the record of the last trial and considered the briefs and arguments, we find that the judgment is not against the manifest weight of the evidence. The judgment of the Circuit Court of Cook County is affirmed. ✓

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.



45012

WILLIAM M. McCAULEY,  
Appellee,

v.

CHARLES E. PADEN, LUBRI-GAS CORPORA-  
TION, a corporation, and UPPER AVENUE  
NATIONAL BANK OF CHICAGO, a corporation,  
Appellants.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

34 I.A. 70

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for commissions as a salesman employed by defendant Paden to sell his product. Defendant filed a counterclaim for excess drawing against commissions not earned. A jury was waived, and a trial resulted in a finding and judgment for plaintiff against defendant Paden for \$5717.34 and costs.

The controversy centers around the right of plaintiff to commissions on sales made by defendant to one Romeo DeLisle of Three Rivers, Canada. Plaintiff claimed that he procured the orders, defendant contending that plaintiff had nothing to do with the sales to DeLisle. There is a sharp conflict in the testimony. Several witnesses for plaintiff testified to admissions by defendant Paden that plaintiff had procured these orders from DeLisle, which defendant Paden denied. The credibility of plaintiff and defendant Paden as witnesses is attacked.

A review of the evidence in the record convinces us that the finding and judgment of the court are not against the manifest weight of the evidence, the only ground upon which defendant relies for reversal. Schneiderman v. Interstate Transit Lines, 331 Ill. App. 143; affirmed 401 Ill. 172.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



341 11. 11. 20 11-5-50

1652

THIRD DISTRICT

General No. 9682

Agenda No. 2

Plaintiff-Appellee,

vs.

Appeal From

Defendant-Appellant.

Circuit Court of  
Christian County

# # # # # # # # # #

Elmer Wurl.

Counter Plaintiff-Appellant,

VS.

Gene Hunsley,

Counter Defendant-Appellee.

Wheat, P. J.

341A.247

This action arises out of a collision between the automobile truck of plaintiff-appellee Gene Hunsley, and the passenger automobile of defendant-appellant, Elmer Wurl. Judgment was entered upon the jury's verdict of \$1925.00 in favor of plaintiff in his action, and for costs as to defendant's counter-claim. Upon denial of motion for judgment notwithstanding the verdict, and motion for new trial, this appeal was taken.

This complaint charges that in the night time of June 20, 1948, plaintiff, in the exercise of due care, was driving his truck in a northwesterly direction upon Route 29 at a point



where it traverses a bridge across Sugar Creek in Sangamon County, Illinois; that at said time and place defendant was driving his automobile upon said highway in a southeasterly direction; that defendant was negligent in either or both of the acts of driving his vehicle to his left across the center line of the pavement into the wrong lane of traffic, and driving at an excessive speed; damages were asked for loss of use of the truck and for damage to the truck. Defendant filed a counter-claim charging similar acts of negligence and willful and wanton misconduct on the part of plaintiff counter-defendant, requesting damages for personal injuries, for damage to his car, and for loss of the use thereof. ✓ ✓ X ||

From the evidence it appears that the collision occurred about 11 P.M.; the night was dark but visibility was good; the two-lane concrete pavement was dry; plaintiff accompanied by his wife, was driving his truck northwesterly; following him was a truck driven by his employer, Albert Linne, who was accompanied by plaintiff's brother, Glenn Hunsley and William Stone; Defendant, accompanied by his wife (and thirteen year old son who was sleeping in the rear seat of the car) was driving his automobile southeasterly on the highway. His car was followed by one driven by one Williams who was accompanied by his wife. At some point on the bridge crossing Sugar Creek the left front parts of the two vehicles collided. The bridge consisted of a central portion about 120 feet long with a superstructure; at the southeasterly end of this was a concrete girder span about 20 feet long; at the northwesterly end of the superstructure part were three concrete girder spans, the northerly one being about 20 feet long, the center one about 42 feet long, and the one connecting with the superstructure span about 43 feet long. X





The plat in evidence indicates the width of the highway at both ends of the bridge to be 20 feet, and the width of the 248 foot bridge to be 21 feet curb to curb. The point of collision on the bridge is in dispute. Plaintiff and his witnesses (his wife and the three occupants of the following truck) fix the point of impact on that part of the bridge with the superstructure. Defendant and his witnesses (his wife and the two occupants of the following car) fix the point as being northerly of the part with the superstructure and on the center concrete span. Each party, corroborated by such witnesses, testified that he was driving on his right side of the center line of the pavement, and that the opposite party drove his vehicle to the left across the center line into the wrong lane of pavement. Both vehicles were damaged and defendant sustained slight personal injuries. The jury apparently believed the testimony of plaintiff and his witnesses and, as stated, made an award of \$1925.00 for damage to the truck and loss of its use.

Although defendant has assigned eight errors as grounds for reversal, he has argued but three, thus waiving the others. His first and second points are that there was no substantial evidence tending to show that plaintiff was in the exercise of due care, or that defendant was negligent. To indicate the unsoundness of this argument, it is only necessary to state that the proximate cause of the collision was the wrongful crossing of the center line of the pavement by one of the drivers. Plaintiff, corroborated by four witnesses, testified that he was on his right side and that defendant wrongfully crossed the line. Defendant, corroborated by three witnesses, testified to the exact opposite. It is apparent that there was sufficient evidence on the subjects of due care and negligence for the issues to be passed upon by the jury. If it can be said that the ques-



tion of the speed of either vehicle is material, this also was in dispute and was a matter for the jury to pass upon. It cannot be said from the evidence that as a matter of law, plaintiff was guilty of failure to exercise care or that defendant was free from negligence.

It is next urged that an immaterial issue was formed and submitted to the jury on the subject to whether or not plaintiff's truck was equipped with a speed governor. When the plaintiff testified on December 1, 1948, he was still the owner of the truck which was stored at a garage. He stated that at the time of the collision the truck was equipped with a governor which limited his speed to fifty miles per hour. Defendant testified that he examined the truck sometime after the collision and that it had no governor on it. By way of rebuttal plaintiff testified that during the trial and in the presence of his brother and father he examined the truck; that it was in the same condition as it was right after the accident; that it had a governor on it, which he removed together with the carburetor, and he then exhibited them to the jury. They were not offered in evidence. Glenn Hunsley, the brother, testified to the same effect. No objection was made to the testimony of plaintiff except to one question by which he was asked to designate by name the apparatus marked Exhibit 2, being the governor. The objection was that the matter was self-serving and no foundation had been laid, and such objection was overruled. No objection at all was made as to the testimony of Glenn and no motion to strike was made as to the testimony of either witness. It does not appear that the question of speed is controlling in this case, but that the essential issue was as to which driver cross-



ed the center line of the pavement. In addition to this, one of defendant's given instructions fully and accurately defined the issues. The adduction of this testimony was not error.

In his original complaint, plaintiff asked for damages in the sum of \$1000.00 for his truck and \$2000.00 for loss of its use. A witness testified that the value of the truck was \$1500.00 or \$1600.00. The proof showed the value of the loss of use to be about \$425.00. - The verdict of the jury was for \$1925.00. Prior to the entry of judgment, but after verdict, plaintiff was permitted to amend the ad damnum clause by changing the amount of the allegation as to the damage to the truck from \$1000.00 to \$1500.00. The allowance of such amendment was proper and in accordance with the provision of the Civil Practice Act (Sec.170 Chap.110 Illinois Revised Statutes 1947) also Tomlinson v. Earnshaw 112 Ill.311; Burns v. Kaylor 264 Ill.App.469.

One of the errors assigned, although not argued and thus waived, will be commented on briefly. The motion for new trial, among other things, asserts that additional evidence had been discovered which would show that the plaintiff and his brother Glenn perjured themselves when they testified in rebuttal that the truck had a governor on it December 2, 1948, as hereinbefore set forth. The substance of the affidavits attached to the motion is to the effect that after the trial, on December 4, 1948, defendant, accompanied by a photographer, examined the manifold on plaintiff's truck and certain attached photographs were taken of such manifold. It is argued that a governor is located between the carburetor and the manifold of a motor, and that these photographs show that one of the bolts on the manifold which connect it with the



carburetor was sheared off; that the remaining bolt shown in the pictures was not of sufficient length to extend through a governor and then onto the carburetor, or to restate, the bolt was only long enough to attach the carburetor to the manifold. The conclusion is drawn that hence there was no governor on the car December 2, 1948. A garage mechanic furnished an affidavit of similar import relating to his examination of the truck December 5, 1948. As has been stated before, there was no issue in the case as to whether the truck was or was not equipped with a governor. As to whether or not defendant was diligent in obtaining any such evidence it is noted that plaintiff testified on December 1, 1948, that the truck had a governor; on December 2 defendant testified that there was no governor on the truck; on December 3 plaintiff and his brother gave the testimony now the subject of controversy; on the same day defendant and a witness Spillman again denied that there was any governor on the truck. It appears that defendant had ample opportunity to examine the truck before and during the trial, and in fact did so. As to the value of these affidavits and photographs, they relate to a time six months after the accident; it does not appear whether the bolt in the photograph was the one actually used in attaching the carburetor to the manifold. In Graham v. Hagmann, 270 Ill. 252, it is said that newly discovered evidence must be material and that due diligence must have been used to procure it. It must be of a conclusive character, material to the issue, and relate to the merits of the case. It is not sufficient that it tends to impeach a witness. In this case the evidence is not material and no showing of diligence has been made. It does not appear that the result of the trial would have been any different if no testimony had been introduced on





- 7 -

the subject of a governor.

Finding no error in the proceedings, the judgment of the  
Circuit Court is affirmed.

Affirmed.



Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT  
May Term, A. D. 1950.

General Nos. 9695-9696-Cons.

Agenda No. 6

William Weisel and Ruth Weisel,  
Plaintiffs-Appellees,

-vs-

Maurice Revitz and Philip Revitz,  
Defendants-Appellants.

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Maurice Revitz et al.,  
Counterclaimants,

-vs-

William Weisel et al.,  
Counterdefendants.

) Appeal from

) Circuit Court of

) Champaign County.

3411A. 2381

DADY, J.

This suit was commenced in the Circuit Court of Champaign County by appellees William Weisel and Ruth Weisel, husband and wife, as vendors, against appellants Maurice Revitz and Philip Revitz, as vendees, on a contract for the sale of certain real estate and of the merchandise in a store building located thereon. The appellants filed a counter-claim against the appellees on the same contract.

Count three of the complaint as amended was addressed to the equity side of the court, and asked for the cancellation of the contract. On March 3, 1949, on the motion of plaintiffs, a decree was entered on count three, which decree found that immediately after the execution of the contract the defendants entered into possession of the real estate and assumed control of the business, merchandise and stock in trade, and did sell and dispose of all of the merchandise therein located, and after so disposing of said personal property \* \* \* did abandon the said real estate and did

Abstract

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA  
FILED FOR RECORD  
JULY 10, 1940  
BY CLERK, U. S. COURT.

Exhibit A.

General and Special Agents.

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JULY 10, 1940.

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notify the plaintiffs that they would make no further payments under the contract, and that plaintiffs should protect whatever interests they had in the property that was by said agreement to be transferred to the defendants." The decree then decreed that defendants had no right, title or interest in or to said real estate, and ordered that defendants be forever enjoined from making any claim of right, title or interest in or to said real estate. No appeal was taken from the entry of such decree.

Thereafter the cause proceeded to trial before a jury on counts one and two of the complaint and on the counter-claim.

At the conclusion of all evidence offered by counter-claimants, the trial court, on motion of counter-defendants, directed a verdict for counter-defendants on the counter-claim, and then entered a judgment for counter-defendants on such verdict. In their brief filed in this court appellants say they "do not now ask for a new trial on the counter-complaint." This makes it unnecessary for us to discuss the propriety of such last judgment.

Counts one and two of the complaint and the answers thereto were lengthy and repetitious. We consider it sufficient to say that the issues thereby presented were whether the defendants breached the contract, and if so, what damages, if any, the plaintiffs were entitled to recover for such breach.

At the conclusion of all of the evidence the trial court, on motion of the plaintiffs, directed the jury to find the issues for the plaintiffs, but did not direct the jury to assess the damages at any particular amount. The jury then returned a verdict for the plaintiffs and assessed plaintiffs' damages at \$1.00. The court then entered judgment for \$1.00 and costs in favor of

[illegible]

plaintiffs on such verdict. Thereupon the defendants in open court at once paid such judgment and the court said, "Let the record show satisfaction of judgment and costs in open court."

Thereafter, and within the time allowed by statute, the plaintiffs moved that the judgment be vacated and that the court render a judgment in favor of the plaintiffs and against defendants notwithstanding the verdict, in accordance with the law and the evidence, and, in the alternative, that the court award plaintiffs a new trial upon the issues tendered.

In passing on such motion, the trial court entered a judgment for \$4623.85 and costs in favor of plaintiffs and against defendants notwithstanding the verdict, and denied plaintiffs' alternative motion for a new trial. The defendants bring this appeal from such judgment order.

The brief of the defendants-appellants concludes with these words: "The defendants respectfully pray that because of the facts in this case and because of the cases cited pertinent to the issues, the judgment of the Trial Court entering a judgment in favor of the plaintiffs for \$4623.85 notwithstanding the jury's verdict of \$1.00 heretofore satisfied of record, be reversed with directions that the verdict of the jury in favor of the plaintiffs in the amount of \$1.00 be reinstated, and the same stand satisfied of record."

This being the only relief asked by the defendants-appellants, it is our opinion that we need only pass upon the question of whether such judgment should have been for \$1.00 or for at least \$4623.85. However, we will also briefly discuss the propriety of the allowance of the judgment.

plaintiffs on such verdict. Therefore the Court will be open  
count at once with such judgment and the Court said, "Let the  
record show satisfaction of judgment and Court for a verdict."  
Thereafter, and within the time allowed by statute, the  
plaintiffs moved that the judge and the verdict be set aside  
and a judgment in favor of the plaintiff be entered. The Court  
notwithstanding the verdict, in favor of the plaintiff, the  
evidence, and, in the alternative, a judgment in favor of the  
a new trial upon the facts and law.  
In passing on such motion, the Court said that the Court  
for \$482.82 and found in favor of the plaintiff. The Court  
notwithstanding the verdict, and made a judgment in favor of the  
motion for a new trial. The Court said that the Court  
such judgment order.  
The bill of the defendant was filed and considered. The  
verdict: "The defendant, and the plaintiff, and the Court  
facts in this case and judgment in favor of the plaintiff  
therein, the judge and the Court said that the Court  
favor of the plaintiff for \$482.82 and the Court  
verdict of \$1.00 therefore satisfied the Court and the  
directions that the verdict of the jury be set aside and  
in the amount of \$1.00 be reinstated, and the Court said that  
of record."

This being the only matter raised by the defendant's motion,  
it is our opinion that we need give no further consideration  
whether such judgment should have been for \$1.00 or for at least  
\$482.82. However, we will also briefly discuss the propriety of  
the allowance of the judgment.



✓

The contract of purchase was dated March 8, 1948. It stated that the purchase price was \$53,000.00, payable in specified installments, \$5,000.00 cash, and the last payment to be made "upon transfer of good and merchantable title to the real estate, together with a title guarantee policy in grantors in connection therewith. \*\*\* The seller \*\*\* to deliver to the buyer a bill of sale. The seller \*\*\* to execute a Bulk Sales Affidavit, in accordance with the terms of the Bulk Sales Act, simultaneously with the delivery of the deed. \*\*\* the transfer of the real estate shall take place on or about April 1, 1948," the sellers to "transfer to the buyers" the real estate, and "the inventory, good will, and trade name" used by the sellers in conducting a business on said premises, and that "the title to the inventory, good will and business" to immediately pass to the buyers.

On or about March 9, 1948, the defendants, by virtue of the contract, entered into possession of said real estate and of the merchandise and other personal property in the store building, and defendants continued in such possession until on or about May 27, 1948. While in such possession they sold, mostly at public auction, which began May 3, 1948, all of such merchandise, and other merchandise which defendants brought into the store. During that period the defendants removed from the store all or most of the fixtures that were in the store when they took possession.

Under date of May 25, 1948, the plaintiffs wrote defendants that plaintiffs were ready to deliver to defendants and "hereby make tender" of a Bill of Sale of the personal property, an affidavit under the Bulk Sales Act, a title guarantee policy and a warranty deed.

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On May 27, 1948, the attorney for the defendants wrote the plaintiffs acknowledging receipt of the letter of May 25th, stating that the guarantee policy would not be acceptable because the defendants "had the information that you, Mr. Weisel, divorced the first Mrs. Weisel some years back while she was under disability, and in consequence, the divorce is void." The letter then stated that the defendants "will not hereafter pay any further moneys under this agreement, and it will be up to you to protect whatever interest you have in the property."

Other than matters in mitigation of damages, the only defense pleaded by defendants was that William Weisel, before marrying Ruth Weisel, was married to and never legally divorced from another woman, and that therefore the plaintiffs could not deliver a guarantee policy showing good title in plaintiffs and could not convey good title. The guarantee policy contained no reference to any former marriage of William Weisel, and no reference to a possible inchoate dower interest in a former wife of William Weisel. There was admitted in evidence, on motion of plaintiffs, a certified copy of a decree of divorce of the Superior Court of Cook County which showed that on January 7, 1935, Sarah Weisel, as plaintiff, obtained a decree of divorce from William Weisel. Defendants offered in evidence, but the court sustained objections thereto, a certified copy of an order of the County Court of Cook County which showed that on May 25, 1923, Sarah Weisel was adjudged insane on the application of William Weisel and was committed to a State Hospital, and a certificate by the clerk of the County Court of Cook County which stated that the record of such County Court "discloses that said Sarah Weisel \*\*\* was adjudged as improved on June 3, 1929, and that \*\*\* a thorough search \*\*\* discloses there \*\*\* was no



order of restoration entered up to" June 16, 1948. This was all the material evidence introduced or offered on the question of whether William Weisel was or was not legally divorced from Sarah Weisel. It is our opinion that in this collateral proceeding such proof was not sufficient to show or fairly tend to show that William Weisel and his former wife were not legally divorced. Moreover, the undisputed evidence shows such real estate was owned by plaintiffs as joint tenants and not as tenants in common. Therefore the former wife of William Weisel did not have an inchoate dower or other interest in the real estate. (See Hoefner v. Hoefner, 398 Ill. 253.)

It is our opinion that there was no evidence fairly tending to support the defense thus interposed by defendants. It is also our opinion that the evidence clearly shows plaintiffs' recoverable damages were in excess of \$4623.85. Therefore the trial court did not err in entering such judgment. (See Hughes v. Early, 404 Ill. 74.)

The order appealed from is affirmed.

Affirmed.



44874

TIGHE E. WOODS, Housing Expediter,  
Office of the Housing Expediter,  
for and on behalf of the United  
States,

Appellee,

v.

CATHERINE SCHULTZ,

Appellant.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

341 I.A. 248<sup>2</sup>

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION  
OF THE COURT.

Tighe E. Woods, Housing Expediter, brought suit against the defendant, Catherine Schultz, for restitution of rent overcharges occurring prior to June 30, 1947, pursuant to sections 1 (b) and 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. 901 et seq.), and also for injunctive relief pursuant to section 206 (b) of the Housing and Rent Act of 1947 (50 U.S.C.A. 1896 (b)). A claim for treble damages under the 1942 Act was abandoned at the trial of the cause and is not urged on this appeal. By decree entered on March 29, 1949 the chancellor granted the injunction restraining defendant "(a) from soliciting, demanding, accepting, or receiving, directly or indirectly, any rents in excess of the maximum rents prescribed by the Controlled Housing Rent Regulation as heretofore or hereafter amended, or in excess of the maximum rents permitted by any other regulation or order heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947, \* \* \*; (b) from soliciting and requiring any tenant or prospective





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tenant to purchase furniture, or any other thing of value, as a condition to renting any controlled housing accommodations, of which the defendant is the landlord within the meaning and definition of the Housing and Rent Act of 1947, and either directly or indirectly effecting any tie-in sale prohibited by the aforesaid Acts and the Regulation"; the chancellor also decreed that the contract for the sale of the furniture from the defendant to three tenants be cancelled, and title to the furniture be declared to be in defendant, and ordered defendant to make refunds of the amounts collected for the sales of furniture to Storn, Winterroth and Kapetanakis in the amounts which they respectively paid therefor; and he further ordered defendant to make refunds to six of the tenants, including the three who had purchased furniture, of rents collected in excess of the maximum rents prescribed by the Act and the Regulations issued thereunder, or a total of \$640.00. Defendant appeals from the decree.

X Defendant is the landlord of the premises in question, a multiple-unit apartment building located at 3927-29 Southport avenue in Chicago. The amended and supplemental complaint alleged that the rentals were controlled under the act; that the maximum rentals prescribed were \$37.50 per month as to all of the apartments at 3927 Southport avenue, except the second-floor front which was \$40.00 per month; but that defendant received \$45.00



-3-

per month for each of the two rear apartments, and \$47.50 for each of the two front apartments; that the maximum rentals at 3929 Southport avenue were \$37.50 per month for the rear apartments, and \$40.00 per month for the front apartments; but that defendant received \$45.00 per month for the third-floor rear, and \$47.50 for the first-floor front apartment; and that these rentals covered periods substantially from March 10, 1947 to December 18, 1947.

It is further alleged that as a condition of renting some of these apartments, defendant required one of the prospective tenants, Bert Storn (first-floor rear apartment at 3927 Southport avenue) to purchase for \$1400.00 furniture then contained in the apartment; required Edward G. Winterroth (first-floor front apartment at 3929 Southport avenue) to purchase furniture for \$1900.00; and required Nick Kapetanakis (third-floor rear apartment at 3929 Southport avenue) to purchase furniture for \$1200.00; and that defendant failed to secure the written consent of the Expediter for any of these purchases, as provided by section 9 (b) of the Rent Regulation and section 8 (b) of the Controlled Regulation. The gist of the complaint is that the defendant landlord was guilty of violating both acts and the regulations issued pursuant thereto by (1) charging more monthly rent than that established pursuant to



law, and (2) demanding that three of the tenants involved purchase furniture as a condition precedent to obtaining possession of the housing accommodations.

Section 2 (b) of the Emergency Price Control Act provides that the Administrator may issue such regulations as "will effectuate the purposes of this Act." Pursuant to that section the Administrator issued the Rent Regulation for Housing (8 F.R. 7322). Section 4 thereof provides for the establishment of maximum rents on the housing accommodations in question. Subsequent sections provide that evasive practices, including "tie-in" agreements, are prohibited. Section 9 (b) specifically forbids the purchase of furniture as a condition to renting housing accommodations. It reads as follows: "(b) Purchase of property as condition of renting--Specifically but without limitation on the foregoing, no person shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting housing accommodations." Under section 204 (d) of the Housing and Rent Act of 1947, as amended, the Expediter is authorized to issue such regulations as he deems necessary to carry out the provisions of the act, and it is alleged that pursuant to that authority the Expediter issued the Controlled Housing Rent Regulation (12 F.R. 4331) under which evasive practices and fur-



niture sales were prohibited in the same manner as under the 1942 act. Section 8 (b) of the regulation under the 1947 act contains the following provision: "Purchase of property as condition of renting.--Specifically but without limitation on the foregoing, no person shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting housing accommodations unless the prior written consent of the Expediter is obtained."

Defendant's answer denied that she was engaged in any practices constituting a violation of section 4 of the act of 1942, denied that the maximum rentals were as set forth in the complaint, but averred that the rentals were \$45.00 per month for the rear apartments, and \$47.50 for the front apartments, in all the premises in question, and that she did not receive more than these maximum rentals; she further denied that she required either Storn, Winterroth, or Kapetanakis to purchase furniture for the respective sums alleged in the amended complaint, in violation of any law, or that she operated housing accommodations in violation of the Act or Regulations.

By way of defense defendant further averred that no notice from the Rent Director was ever served on her, seeking to establish or reduce the rent to the maximum rents set forth in the amended complaint; that any action claimed as the basis for establishing the alleged maximum





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rentals was taken arbitrarily by the Rent Director; and that an appeal from the Director's action or order was taken to the Housing Expediter in Washington D. C., where it was still pending and undisposed of.

It is first urged on behalf of defendant that there is no proof in the record tending to indicate what the maximum rents were on the apartments in question, or that there was any proof that the rents collected were not proper under the 1942 Act; and that such proof of the maximum rent is a prerequisite to the determination of any overcharges and of the Expediter's right to injunctive relief under the act. Although defendant's answer denied the establishment of maximum rents which were specifically set forth in the amended complaint, her denial is in effect nothing more than an attack upon the issuance of the orders of the Administrator because, as she avers, "no notice from the Rent Director was ever served on defendant seeking to establish or reduce the rent to the maximum rent set forth in the complaint," and that the action of the Administrator as the basis for establishing the alleged maximum rentals was appealed to the Housing Rent Expediter at Washington, D.C., and was still undisposed of. However, these averments amount to an admission that the maximum rent orders were issued, and also that the rents were collected in amounts in excess of those that were estab-



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lished by the Rent Regulations. Plaintiff, having alleged the maximum rentals fixed by the Expediter, was not required to adduce any further proof as a prerequisite to a determination of any overcharges in view of these admissions.

As the principal ground for reversal it is urged by defendant that the furniture sales were not per se unlawful; that the regulation of the Housing Expediter found in section 8 simply has the effect of bringing the defendant and the sales of furniture under the inquiry and inspection of the Expediter with respect to possible violation of section 206 by means of evasion, whereas otherwise the right of the Expediter to compel such inquiry as to sales of furniture might be open to question. In this connection it was urged upon trial that proof of value was necessary to determine the rent overcharge from furniture sales, and to support her contention defendant offered to prove the value of the furniture, to which an objection by plaintiff was sustained. The very recent case of Small v. Schultz, 173 F. 2d 940 (3-21-49), involving the same defendant as here, is based on a similar set of circumstances, and in both proceedings defendant interposed the same defense. As here, defendant in the Small case had advertised an apartment for rent in the classified section of the Chicago Tribune, and in connection therewith furniture



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was advertised for sale. The plaintiff in that case replied to the advertisement, and as a condition to the leasing paid defendant the sum of \$1900.00 for certain furniture located within the apartment that he sought to rent. The evidence in the instant case also supports the conclusion that the purchase of the furniture was a condition to the lease. After reviewing the facts in the Small case, the United States Court of Appeals narrowed the issue there presented to the amount of recovery to which plaintiff was entitled. Calling attention to the fact that that proceeding was a civil suit for damages predicated upon section 205 of the statute, the court said that the liability of a landlord who violated section 8 (a) of the regulation or who failed to obtain the consent of the Expediter, as defendant failed to do in the instant proceeding, would be no different from that of a landlord who accepted cash in excess of maximum rents. The court held that without doubt plaintiff had a cause of action under the statute and regulation, but said that "the amount of recovery to which he is entitled is the important question"; and that in order to determine the overcharge the court would be required to try the issue and make a finding of fact as to the value. As to the measure of damages, it was held that the overcharge in the Small case was the difference, if any, between the fair cash market value of the furniture which was sold to



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plaintiff by the defendant and the amount which plaintiff paid for such furniture. The judgment was accordingly reversed and the cause remanded with directions that the trial court proceed as indicated. We think the instant proceeding should take a similar course, and either the court or a jury should determine by competent evidence the difference, if any, between the fair cash market value of the furniture which was sold to these various tenants by the defendant and the amount which they paid for such furniture.

With respect to the refund of \$640.00 ordered to be made to six of the tenants, including the three who had purchased furniture, we are of opinion that the evidence supports that provision in the decree.

For the reasons indicated, the decree of the Circuit Court is affirmed in all respects, except as to the refund ordered to be paid for the sale of furniture. That portion of the decree is reversed and the cause remanded for the sole purpose of having the court or jury determine from such competent evidence as may be presented what the fair cash market value of the furniture was at the time it was sold, to deduct those amounts from the sums paid by the respective tenants, and incorporate the difference in the decree to be entered.

Decree affirmed in part, reversed in part, and cause remanded with directions.

Scanlan and Schwartz, JJ., concur.





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## AGENDA 6

Appeal from the  
Circuit Court of  
St. Clair County,  
Illinois.

341 I.A. 249

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The primary issue which the lower court had to determine was whether or not John R. Pear had, in fact, the intention of creating a trust in favor of the appellant at the time such transaction occurred. Most of the evidence relating



to the settlor's intention is found from advice he received from Mr. Edgar Philip Hellmuth, manager of the St. Louis loan agency.

On July 31, 1942, John R. Pear had purchased \$5,000.00 worth of stock in the company in question. Mr. Hellmuth then advised him if he wished to buy more than the amount he had already purchased and have federal insurance protection, it would be necessary to buy said stock under another title. Mr. Hellmuth told Mr. Pear such stock could be put in his name and that of some other member of his family or either as survivor, or he could put it in his name as trustee for any member of his family or any number of members of his family. In such case a voluntary trust would result in which Mr. Pear would have full control of the money during his lifetime and could make any withdrawals or cancel the account, but that if he were to die with that certificate in trust, whoever he mentioned as beneficiary would take possession of said stock upon the filing of a simple proof of death with the company. After being so advised, John R. Pear said, "Well, I will take out an account in my name as trustee for my brother Jake."

During the course of the next four years, John R. Pear filled out some 25 applications for the issuance of stock certificates in said loan company. Sixteen of these applications were signed, "John R. Pear, Trustee," and the other applications were signed individually. All the stock certificates were issued in the name of John R. Pear, Trustee for Jacob J. Pear.

On January 12, 1946, the last application was made for \$900.00 worth of stock. This application made a total of \$5,400.00 purchased in the name of John R. Pear, Trustee for Jacob J. Pear. Mr. Hellmuth on that date advised Mr. Pear that he couldn't buy any more stock under this title and have insurance protection but that if he wanted to mention one of his other brothers or any of his relatives or all of them as beneficiaries that he could have a third \$5,000.00



that would be federally insured and protected. This advice was given prior to the application for the last 9 shares. Mr. Pear replied, "I will make it out to Jake Pear because he needs the money more than anyone else."

On cross examination Mr. Hellmuth testified that John R. Pear knew prior to the time he started the trust account in question that \$5,000.00 was the maximum amount on which insurance could be obtained. Mr. Hellmuth testified that he said to Mr. Pear, "We can fix you up other title that can be federally insured." Mr. Pear did not make any intention known to Mr. Hellmuth that he wanted the title transferred to Jacob Pear. He only said that "Jake needs the money more than anybody else." It is not clear whether such statement was made only once or in both 1942 and 1946.

In passing upon the settlor's intention the trial court was necessarily guided by the principal of law which requires the proponent of the trust to submit proof thereof which is so clear and convincing that it is unequivocal and unmistakable to the extent of sustaining only one conclusion. Cusack vs. Cusack, 339 Ill. 108, and cases cited; Banning vs. Peterson, 363 Ill. 464. The findings of the lower court that no trust was intended or created will not be disturbed unless such are against the manifest weight of the evidence. Evangeloff vs. Evangeloff, 403 Ill. 118, 123, and cases cited. We have carefully examined the record of this case and can not say that the findings of the trial court are against the manifest weight of the evidence. From the evidence there is considerable doubt as to whether John R. Pear intended to create a trust for appellant or intended to follow the suggestions of Hellmuth only for the purpose of securing more insurance protection. The lower court was justified in resolving this doubt in favor of appellee.

The decision of the Circuit Court of St. Clair County is hereby affirmed.

Scheineman, J. and Culbertson, J. concur.

(To be published abstract only)

FILED  
MAY 23 1950



45022

BEATRICE MONAHAN, VIRGINIA  
LESSNER and GRACE DIEGEL,

Appellants,

v.

CHICAGO TRANSIT AUTHORITY, a  
Municipal Corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

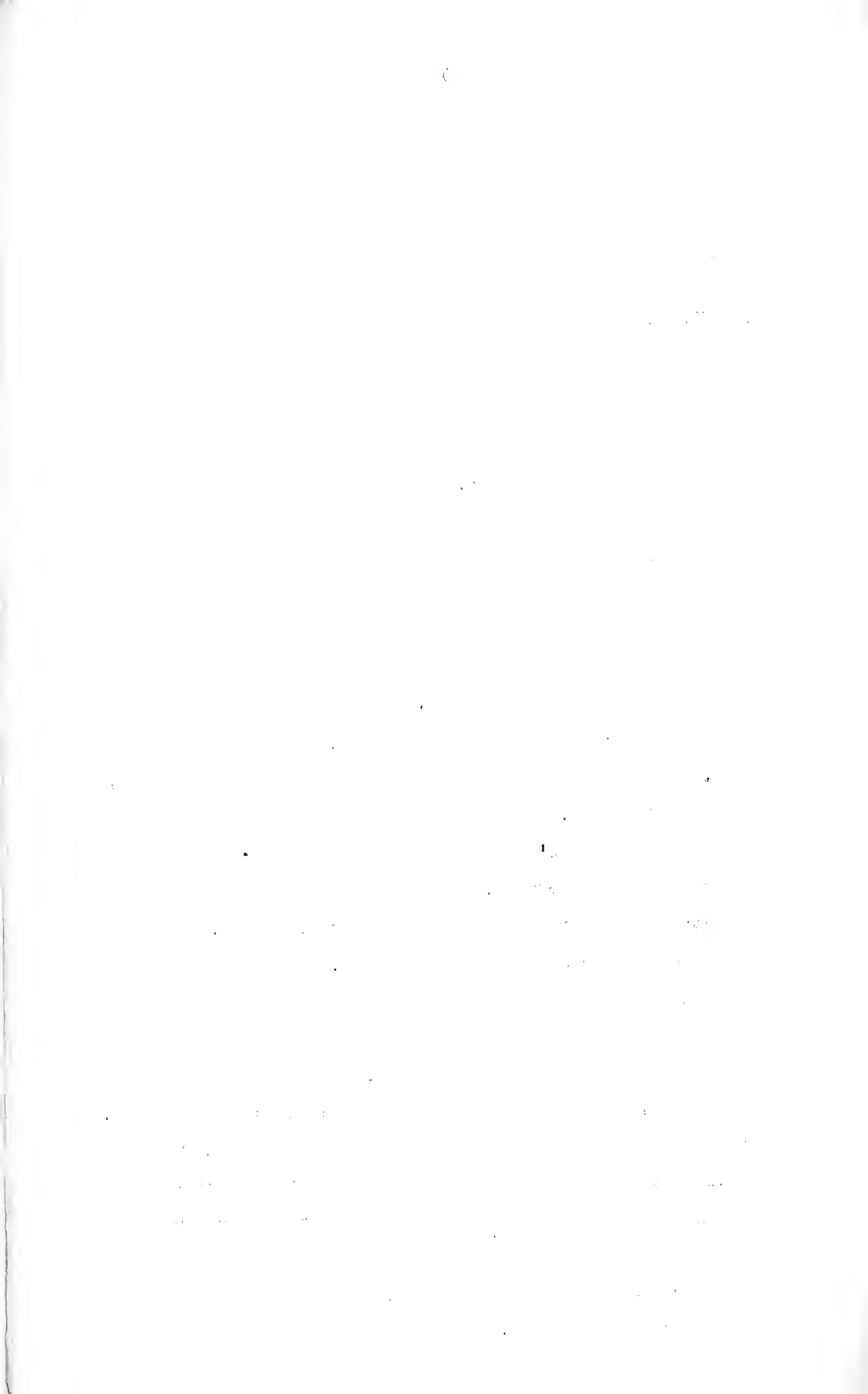
COOK COUNTY.

341 I.A. 250<sup>1</sup>

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff Beatrice Monahan, driver of an automobile, and plaintiffs Virginia Lessner and Grace Diegel, passengers, sued for personal injuries alleged to have been sustained as a result of a collision between the passenger automobile and defendant's streetcar about 8:30 p.m. on February 28, 1948. From a judgment entered on a verdict of not guilty, plaintiffs appeal.

Plaintiffs' automobile was being driven in a westerly direction on Erie Street. Defendant's streetcar was being operated in a northerly direction on Wells Street. The collision occurred in the intersection. Plaintiffs maintain that the accident was due to the inattention of defendant's motorman and to the further fact that the streetcar was being operated at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of the way. Defendant denies any negligence in the operation of its vehicle and further maintains that the plaintiffs were guilty of contributory negligence. Inasmuch as this case must be reversed and remanded for errors committed on the trial, no consideration of the evidence, other than it affects these questions, is necessary.





Defendant called as its witness Police Officer O'Shea, who testified that he prepared a written report of the accident, having gone to the scene after the occurrence. The following questions and answers are taken from the transcript of his testimony:

"Mr. Fleming: Q What did you report as to what the driver of the automobile was doing and what did you report the operator of the streetcar was doing?

"The Court: Q Do you know of your own recollection after refreshing your memory?

"Mr. Reiff: I am still objecting---what he reported.

"The Court: I don't know about that; why, what's the objection?

"Mr. Reiff: If he knows, let him state, but what he reported---

"The Court: It's a matter of testing his knowledge. It seems to me he can testify to what he recalls.

"The Witness: According to the report here---

"The Court: What you recollect about it now, if anything. What do you recollect?

"A Vehicle number 2 driving properly.

"The Court: Don't read it; if you don't remember, say so.

"A I guess I don't recall, it was quite awhile ago.

" \* \* \*

"Q The streetcar you reported as driving properly and you reported that the other car was inattentive, is that right?

"A Vehicle number 2 driving properly; other one inattentive, that's what I got.

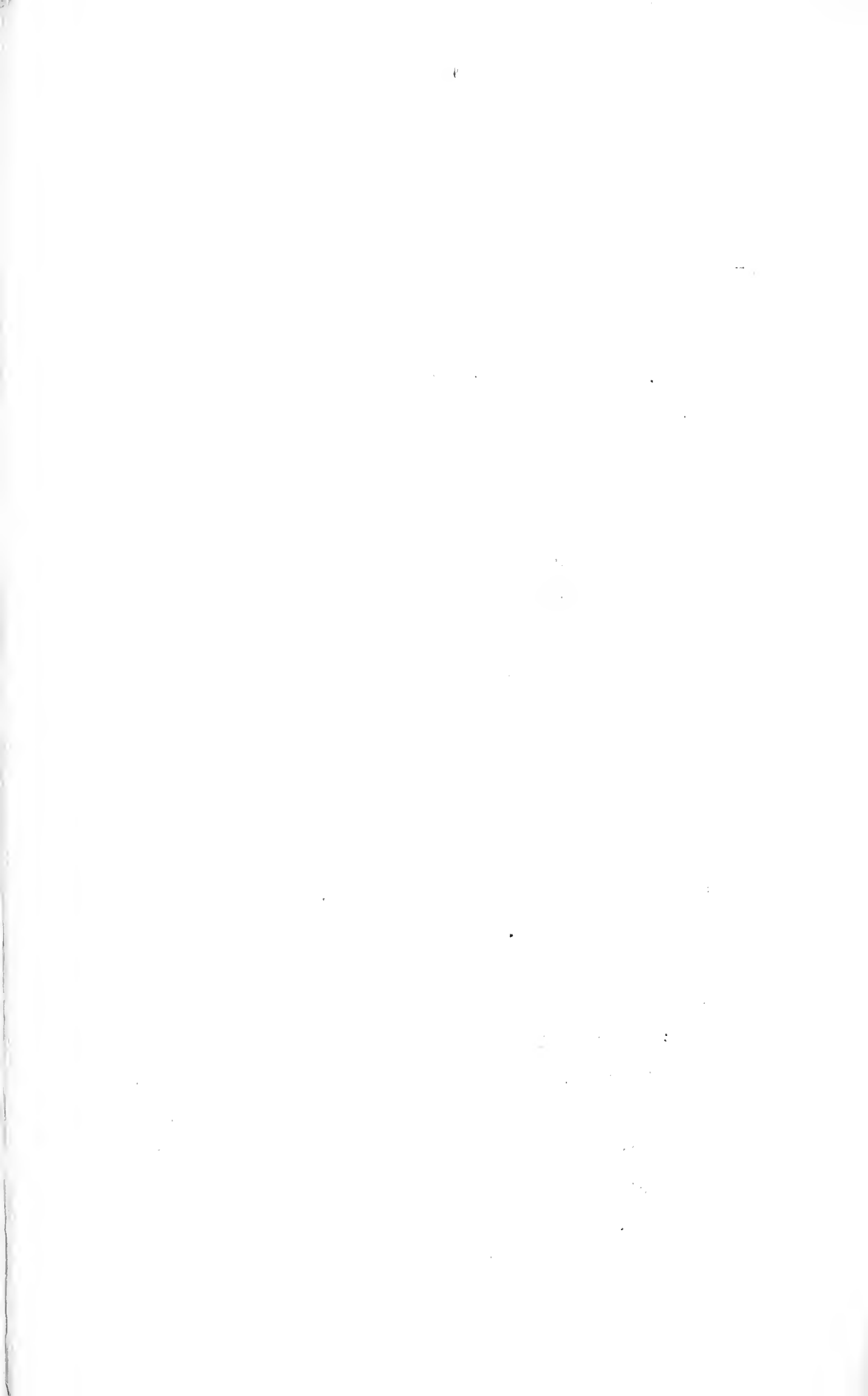
"Q That's what you reported,

"A That's right."



Under what theory this highly incompetent and prejudicial examination was permitted we are at loss to understand. The policeman's report was based entirely upon hearsay, and from such an incompetent document he was permitted to give to the jury the highly prejudicial conclusion that the accident was the fault of the plaintiffs. Defendant seeks to justify the improper questions only on the grounds that they were not objected to. A reading of the examination quoted indicates such excuse is without merit. While the improper answers were induced in part by the court's examination, proceeding upon the falacious theory that the written report might be used to refresh the witness's recollection of an event to which he was not an eyewitness, Biniakiewicz v. Wojtasik, 339 Ill. App. 574, and undoubtedly caused counsel to be less persistent in repeating objections than safe practice would dictate, the court's participation, far from excusing, tended but to emphasize the prejudice.

Additional error against plaintiff Virginia Lessner appears in the admission into evidence, over objection, of defendant's exhibit 1, which is a record of Garfield Park Community Hospital. The Court permitted one Paul Schmitt, a physician employed by the hospital, to read from this record certain entries there appearing in the handwriting of a technician who was not produced or whose absence accounted for. From these entries the jury were informed that the unproduced technician had made serological tests known as the Kahn and Wassermann tests and that they each



showed a finding of 4 plus. The admission of the hospital record and the reading therefrom by the doctor were clearly incompetent and constituted prejudicial error. Wright v. Upson, 303 Ill. 120. The prejudice was intensified when it is considered that the portions read indicated this plaintiff to have been a victim at the time of the accident of a social disease, which in the minds of many laymen imputes moral dereliction. The court was apparently led into error by a misapprehension of the holding in the case of Boss v. Illinois Central R. R. Co., 221 Ill. App. 504. There it was shown that a hospital record was in the handwriting of a nurse since deceased. A witness familiar with the nurse's handwriting was permitted to identify it. The purpose for which the hospital record was admitted in the Boss case does not appear. For certain limited purposes, for example, to refresh a witness's recollection or for impeachment, a hospital record or portions of it may become admissible. As was said in Wright v. Upson, supra, (p. 144):

"If the hospital record is admissible at all it is for the same reason that books of account are admissible and the same character of proof is required, and all persons who make entries therein are required to testify to their correctness before they are admitted in evidence."

The Boss case is only authority for the proposition that records, if otherwise competent, when properly identified, are admissible in evidence and that the death of a party making the records does not exclude their admission if the handwriting is properly proven.



Plaintiffs complain of the offer by defendant's counsel of a statement made to defendant by a party called as defendant's witness and another written statement by this same witness to the police subsequent to the accident. While neither of these statements was admitted, they were offered in the presence of the jury, objection properly made, and ruling on their admissibility withheld by the trial judge. They were not thereafter offered. The statements were clearly erroneous. There could be no question but what they were incompetent, and they should not have been offered in the presence of the jury. Having been offered, they should have been promptly and emphatically denied admission by the trial court. Because of the offer, as well as the failure of the trial court to rule, the inference may well have been drawn by the jury that counsel for plaintiffs sought to keep from their consideration matters having a material and competent bearing upon the issues before them. Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21; Koch v. Pearson, 219 Ill. App. 468.

Complaint is made of defendant's instruction 12, which is as follows:

"The court instructs the jury in the language of an ordinance contained in the Uniform Traffic Code for the City of Chicago that when a street-car has started to cross an intersection no operator of a vehicle shall drive upon or cross the car-tracks within the intersection in front of the street-car.





45003

OLIVER BIBBS,  
Appellee,

v.

JOSEPH DORSEY, C. H. COBBS,  
LUELLA WILLIAMS, JOHN CAIRE,  
Defendants,

On Appeal of C. H. COBBS,  
Appellant.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

341-111-350<sup>2</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff secured a judgment by default for \$4,000 in an action for personal injuries against the several defendants named, except defendant John Caire, who was dismissed out of the action, he being the alleged driver of the automobile involved in the accident. A jury had been waived. Defendant C. H. Cobbs, after term time, filed a petition to vacate the judgment, alleging that he had never been served with a summons, and there was no service upon him in accordance with the statute. An answer was filed to the petition, a hearing was had, and the petition was denied, from which this appeal is prosecuted.

Several grounds are urged for the reversal of the order denying the petition, but we need only consider the one involving the form of the judgment. The judgment order, which was a draft order, signed by the trial judge, reads: "It is ordered that the above entitled cause be dismissed as to defendant, John Caire, only, and on motion of plaintiff, it is further ordered, jury waived, and cause versus



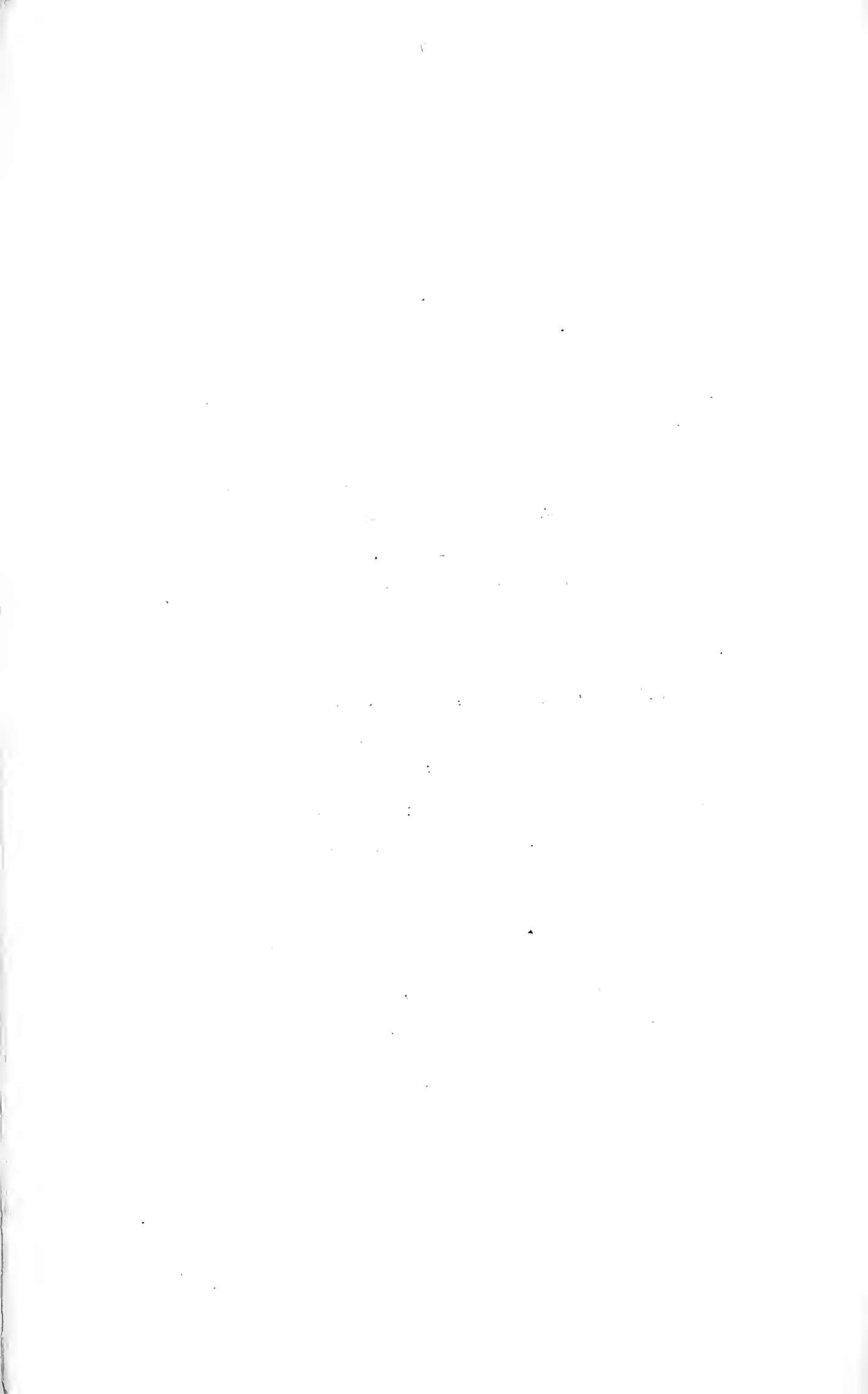
defendants, Joseph Dorsey, C. H. Cobbs and Luella Williams, submitted to Court, Court finds issues for the plaintiff, Oliver Bibbs and assesses the plaintiff's damages in the sum of Four Thousand (\$4,000.00) Dollars and costs. Judgment on the findings."

We regard this judgment order insufficient, in that it lacks the necessary legal element of a judgment against all of the defendants or any of them. We cannot determine from this judgment order against whom the judgment runs. The judgment order must be directed against someone to be valid.

In Martin v. Barnhardt, 39 Ill. 9, there was a verdict of the jury which read: "We, the jury, find the defendant guilty, and assess the plaintiff's damages at three thousand dollars." The judgment order read: "\* \* \* judgment entered upon the verdict for \$3,000 and costs, \* \* \*." It was there said (p. 13):

"This seems to be no more than a loose memorandum, perhaps made by the judge as a minute on his docket, as a guide to the clerk in making up his record. Instead of which, it looks as if the clerk had literally transcribed it into the transcript for this court. We can hardly imagine that the clerk of a circuit court would make such an entry in the records or rolls of his court and call it a judgment. It does not state, by implication even, that it was found, ordered, considered or adjudged by the court that the one or the other party should have or recover any thing of the other. It does not state by whose or by what authority a judgment was rendered. It fails to state in whose favor or against whom it was rendered, nor does it even award execution."

In the case cited there was but one defendant, and did not involve the added uncertainty in the instant case as to which of the defendants the judgment is directed.



In Faulk v. Kellums, 54 Ill. 188, the verdict read: "We, the jury, find in favor of the plaintiff, and assess his damages at the sum of \$4493." The judgment order read: "\* \* \* whereupon the court enters judgment upon the verdict, \* \* \*." It was there stated (p. 191):

"There is also an objection to the form of this judgment, if judgment it may be called, which is well taken. The ideo consideratum est is wanting --it has no element of a judgment other than a bare recognition of the finding of the jury. No action of the court was had upon that finding."

In Fray v. National Fire Ins. Co., 255 Ill. App. 209, the judgment order read: "Now the defendant moves the court for arrest of judgment and after due consideration said motion is by the court overruled and judgment is by the court entered herein against the defendant for the sum of \$1,500 and for cost of this suit." The court said (p. 215):

"It does not show that any judgment was rendered on the verdict, nor in whose favor, and lacks all the essential elements of a legal judgment."

The reasoning in the cases cited is applicable to the form of the judgment in the instant case. The judgment is reversed and the cause remanded with directions to vacate the judgment and allow defendant C. H. Cobbs to defend the action.

REVERSED AND REMANDED WITH  
DIRECTIONS..

Tuchy, P.J., and Niemeyer, J., concur.



45012

WILLIAM M. McCAULEY,  
Appellee,  
v.

CHARLES E. PADEN, LUBRI-GAS CORPORA-  
TION, a corporation, and UPPER AVENUE  
NATIONAL BANK OF CHICAGO, a corporation,  
Appellants.

4  
APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for commissions as a salesman employed by defendant Paden to sell his product. Defendant filed a counterclaim for excess drawing against commissions not earned. A jury was waived, and a trial resulted in a finding and judgment for plaintiff against defendant Paden for \$5717.34 and costs.

The controversy centers around the right of plaintiff to commissions on sales made by defendant to one Romeo DeLisle of Three Rivers, Canada. Plaintiff claimed that he procured the orders, defendant contending that plaintiff had nothing to do with the sales to DeLisle. There is a sharp conflict in the testimony. Several witnesses for plaintiff testified to admissions by defendant Paden that plaintiff had procured these orders from DeLisle, which defendant Paden denied. The credibility of plaintiff and defendant Paden as witnesses is attacked.

A review of the evidence in the record convinces us that the finding and judgment of the court are not against the manifest weight of the evidence, the only ground upon which defendant relies for reversal. Schneiderman v. Interstate Transit Lines, 331 Ill. App. 143; affirmed 401 Ill. 172.

The judgment of the Municipal Court is affirmed.

AFFIRMED.





44998

FRANCES BARNARD,  
Appellee,

v.

JULIUS RUBIN, doing business  
as ARMSTRONG SHRIMP & STEAK  
HOUSE,  
Appellant.

JULIUS RUBIN, doing business  
as ARMSTRONG SHRIMP & STEAK  
HOUSE, for the use of FRANCES  
BARNARD,  
Appellee,

v.

ARMSTRONG SHRIMP HOUSE, INC.,  
a corporation,

Appellant (Garnishee).

APPEAL FROM  
COUNTY COURT  
COOK COUNTY

341 I.A. 251

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant and the garnishee appeal from the respective judgments entered against them on the ground that the County court was without jurisdiction to enter the judgments.

The jurisdiction of the County court is limited to cases "where the amount claimed or the value of the property in controversy shall not exceed \$2,000." Ill. Rev. Stat.

1949, chap. 37, par. 177. The complaint states "That plaintiff claims the sum of \$2,000, together with interest at 6 per cent per annum, from July 19, 1948, all to the damage of the plaintiff in the sum of \$3,000." By the express language of the statute the jurisdiction of the County court depends upon the amount claimed by the plaintiff, and this amount is to be ascertained by the ad damnum. Kieper v. American Coal & Supply Co., 137 Ill. App. 131, 140. The



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court being without jurisdiction because of the amount claimed, the judgment is void and may be attacked at any time. Barnard v. Michael, 392 Ill. 130.

The judgments are reversed.

REVERSED.

Tuohy, P. J., and Feinberg, J., concur.



45015

ELLSWORTH FUNK,

Appellee,

v.

ILLINOIS CENTRAL RAILROAD  
COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

341 I.A. 251<sup>2</sup>

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$9,000 entered in a personal injury action by plaintiff, an employee of The Railway Express Agency, for injuries sustained by him when working as such employee at the railway station at Effingham, Illinois.

Two major contentions are urged by defendant. The first is that action for the alleged negligence of the defendant is governed by section 29 of the Workmen's Compensation Act and that plaintiff's employer is the proper plaintiff, if any, and that damages to be recovered are limited to the amount paid by the employer to plaintiff under the Workmen's Compensation Act. Plaintiff and his employer were subject to this act. Defendant, as a carrier by land, was also subject to the act, but not when engaged in interstate commerce. Goldsmith v. Payne, 300 Ill. 119. It was uncontroverted that the train which caused plaintiff's injury was an interstate train carrying interstate packages. Defendant concedes that Goldsmith v. Payne, supra, holds adversely to its contention, but insists



that the decision is erroneous, being based on a misconception of the holding in Staley v. Illinois Central R. Co., 268 Ill. 356. This court is bound by the decision of the Supreme court, and defendant's contention that this action is controlled by section 29 of the Workmen's Compensation Act cannot be sustained.

Defendant's second contention is that plaintiff was guilty of contributory negligence as a matter of law. The evidence shows without contradiction that plaintiff in the performance of his duties took a 4-wheel baggage truck loaded with express from the main platform to an island platform between the north and southbound tracks of defendant for the purpose of loading his packages into an express car of a southbound train of defendant and of receiving packages from the express messenger on the train. The rear wheels of this truck were fixed and the front wheels were turned by a handle by which plaintiff pulled the truck and placed it in position at the door of the express car. This truck was 44 inches wide, the island platform was 79 inches wide, the rails of the track were two feet from the island platform and the train extended over this platform about three inches. Plaintiff had transferred his packages into the express car and got down off the truck with the intention of moving it to another door of the car. A northbound train approached the station, crossing over the Pennsylvania tracks to the south of where plaintiff was working, at four or five miles an hour. Plaintiff testified that he got off to the east side of his truck, that is, toward the northbound track, and





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walked around to the front of the truck, which was to the north; that at that time the front of the northbound train was crossing the Pennsylvania tracks, about 100 feet away, and that he, plaintiff, "didn't notice that my truck was angled out so that the rear corner would be struck by the train." The cylinder head of the engine hit the rear corner of the truck, forcing it into the side of the express car, injuring plaintiff's hand and causing the amputation of three fingers.

Plaintiff was in complete control of the truck. He alone placed it in the position it was in when struck. No one else was handling or working on the truck. He had been in the employ of the express agency for about five years. The accident occurred in broad daylight, on a bright, clear day, and the train passed three or four similar trucks on the island platform servicing the southbound train without touching any of them. Plaintiff knew that the northbound train was overdue and expected at any moment. Independent of any negligence with which defendant may be charged, the accident could not have happened had plaintiff exercised reasonable care in placing the truck. The burden of establishing the exercise of due care was upon the plaintiff.

Briske v. Village of Burnham, 379 Ill. 193; Illinois Central R. Co. v. Oswald, 338 Ill. 270. Plaintiff being contributorily negligent as a matter of law, the court should have directed a verdict for the defendant or entered judgment for it notwithstanding the verdict. American National Bank v. Woolard, 342 Ill. 148, 155; Mirich v. Forschner Contracting Co., 312 Ill. 343, 356.

The judgment is reversed.

REVERSED.



45029

HARRY M. SCHULMAN and ERNEST  
D. BLOOMENTHAL,

Appellees,

v.

MRS. HENRY R. BROOKS,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

341 I.A. 252

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a partial summary judgment for \$420, being double rent of an apartment occupied by her from May 1, 1948 to June 11, 1948 in plaintiffs' action for double rent for said premises from January 20, 1948 until June 15, 1948.

The monthly rental paid by defendant was \$155. It appears from the pleadings and affidavits filed in support of the summary judgment that on January 20, 1948 plaintiffs obtained a judgment for possession of the premises, the writ of restitution being stayed until May 15, 1948 on condition that defendant pay the rent there-  
tofore paid by her for the use and occupation of the premises during the stay of the writ; that defendant paid to plaintiffs and plaintiffs accepted the sum of \$155 per month for the use and occupancy of the premises for the months of December, 1947 and January, February, March and April, 1948; that the occupancy by defendant of the premises was extended to June 15th on the same terms, whereupon defendant sent her check for \$155 covering the May rental or use and occupation. This check was indorsed by plaintiffs but not cashed. Defendant vacated the



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premises on June 11, 1948 and tendered, as the June rental or use and occupancy of the premises, \$56.87, which plaintiffs refused to accept. Plaintiffs did not move to vacate that portion of the order permitting the defendant to remain in possession upon payment of the former rent, neither did they appeal from that portion of the order. The trial court entered judgment for double rent from May 1st to June 11th, as heretofore stated, and retained jurisdiction of the balance of plaintiffs' claim. Plaintiffs do not contend that the court was without jurisdiction to stay the writ of execution and fix the terms of occupancy by defendant during such stay. So long as defendant was in possession pursuant to the order of the court and complying with the conditions fixed by the court, she was not guilty of wilfully withholding possession.

The judgment is reversed.

REVERSED.

TUOHY, P.J. AND FEINBERG, J. CONCUR.



45010

BLANCHE B. BOHLIN,  
Plaintiff-Appellee,

v.

LeROY JORGENSEN, OLLIE R. SMILE,  
doing business as OLLIE R. SMILE  
REALTY CO., and W. A. McCLELLAND,  
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

OLLIE R. SMILE,  
Defendant-Appellant.

341 I.A. 281

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE  
COURT.

On September 10, 1947, plaintiff signed a preliminary contract with LeRoy and Bernice Jorgensen to purchase certain property owned by them and located at 714 Mulford street, Evanston, Cook county, Illinois. The price of the property was \$24,500. Plaintiff deposited with Ollie R. Smile, defendant, as escrowee, \$1,000 earnest money. Later a sales contract was executed by the parties. On October 14, 1947, plaintiff, through her attorneys, notified the Jorgensens, as principals, and Smile, as escrowee, that she terminated the contract because of the failure of the Jorgensens to show evidence of title within the time specified in the contract. Plaintiff then sued the Jorgensens and Smile to recover the \$1,000 she deposited as earnest money. Answers to the complaint were filed by defendants and the case was tried by the court without a jury. After evidence heard the court entered a judgment for \$1,000 in favor of





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plaintiff and against defendant Ollie R. Smile, and the other defendants were dismissed as defendants in the cause. Defendant Ollie R. Smile appeals from the judgment.

An anomalous situation is presented by this appeal. LeRoy Jorgensen, the seller of the property and a party to the contract, upon the trial disclaimed any right to the \$1,000 fund placed in escrow with defendant Ollie R. Smile, and after Smile had stipulated that he still held the \$1,000 as escrowee, and that the Jorgensens did not get any part of it, by an agreement between plaintiff and the Jorgensens the latter were dismissed out of the suit. The Jorgensens are not interested in this appeal. Although defendant Smile filed no cross-complaint in the suit he is here contending that "plaintiff has failed to prove her case by the preponderance of evidence," and he urges "that the above case should be reversed with directions to find for the defendant Smile." In his brief the fact that the pleadings and the evidence would not support such a judgment order is ignored by Smile. In his reply brief, however, he seems to sense the situation and asks us to reverse the judgment with directions to find for him for the following reasons: Under the terms of the contract the \$1,000 in his possession would be due him as commission from the Jorgensens and after he deducted his



commission there would be no surplus in which the Jorgensens would be interested, "so that there seemed to be no reason for burdening the defendants, Jorgensens, with the expense of continued trial"; that plaintiff failed to prove her right to the money and therefore the judgment should be reversed. It is difficult to believe that this argument is seriously made. Smile stipulated upon the trial that he still held the \$1,000 as escrowee under the contract between plaintiff and the Jorgensens, and neither by pleadings nor evidence did he assert the right to hold the money as commission due him from the Jorgensens. In Hilyard v. Krisolofsky, 337 Ill. 584, the court stated (p. 587):

"Redfield [the escrowee] was not a party to the contract, but he received the money as provided in the contract and was bound by its terms. He was a stakeholder, escrowee or depositary having the custody of funds belonging to defendant in error, title to which was to be divested only upon plaintiffs in error performing the terms of the contract. He held the money for the mutual benefit of both parties and was the agent of both parties."

Plaintiff contends, with force, that under the pleadings and the evidence Smile, an escrowee, has no right to seek the reversal of the instant judgment. The only answer made by Smile to this contention is that it is raised for the first time in this court and



therefore cannot be entertained. The record shows that in the trial court plaintiff caused defendant Smile to stipulate that he still held the fund as an escrowee. Smile's claim that he would be entitled to commission from the Jorgensens, first asserted in his reply brief, is a plain afterthought. It is significant that Smile did not see fit to call Jorgensen as a witness. The trial court was fully warranted in finding that plaintiff was justified in her rescission of the contract, that the Jorgensens acceded to the rescission and considered themselves free to sell the property to others, and, therefore, under the terms of the contract plaintiff was entitled to a refund of the earnest money. It is admitted that about three months after the rescission the Jorgensens sold the property in question to one Menisian and that the sale was handled for the Jorgensens by defendant Smile through his business associate W. A. McClelland. What commission Smile and McClelland received from the Jorgensens in handling that sale the record fails to show.

A reading of this record satisfied us that the instant appeal by defendant Smile is part of a bold effort to retain the \$1,000 earnest money deposited in escrow with him by plaintiff. The Jorgensens disclaimed any right to the fund and if we were to grant the prayer of defendant Smile that we reverse the instant judgment with directions to find for him he would thereby obtain absolute possession of the fund.

The judgment of the Superior court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.  
Friend, P. J., and Schwartz, J., concur.



44867

LOUIS J. SHUDNOW, d.b.a. CHICAGO  
BOWLING MACHINE CO.,  
Appellee,

v.

CITY OF CHICAGO, a municipal  
corporation, et al.,  
Appellants.

269 A  
APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

341 I.A. 281<sup>2</sup>

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE  
COURT.

This is an appeal by defendants from a judgment awarding the plaintiff a writ of mandamus to compel the City of Chicago to issue automatic amusement machine licenses for machines known as Ten Strike and Ten Pins Miniature Bowling Machines. These machines are operated on the customary "nickelin the slot" basis. Defendants contend that they come within the description of bagatelle or pigeonhole games, prohibited by Section 193-26 of the Municipal Code. This ordinance prohibits the keeping or use in any place of public resort within the City of "any tables or implements for any game of bagatelle or pigeonhole. The term 'bagatelle or pigeonhole' \* \* \* shall mean a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect, or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of bagatelle or pigeonhole commonly known as pin games."





The validity of the ordinance is not questioned. Its application to machines of the character of the one in question was upheld in Levins et al. v. City of Chicago, 296 Ill. App. 645, and David Coleman et al. v. City of Chicago, 297 Ill. App. 130. In the latter case one of the appellees was the plaintiff herein. The machines involved were called "Bowlette," "Roll-a-Ball," "Roll-a-Score," "Skee-Roll," "Bowl-a-Ball," "Bally-Roll," "Skee Ball," "Bank-Roll" and "Rock-o-Ball."

It is urged upon this court that there is a difference between the machines involved in the instant case and the machines referred to in the Levins and Coleman cases; that in these machines there are no "holes, pockets or cups" into which balls may drop or become lodged and that there are no arches, pins or springs "to control, deflect or impede the direction or speed of the balls." The City, on the other hand, contends that on the playing surface there are two gutters into which the ball may drop and that once the ball is in a gutter, its direction is controlled. There are also other devices which identify it with machines described in the ordinance. Moreover, the general language of the ordinance, to-wit: "the modern variety of bagatelle or pigeon hole commonly known as pin games" is broad enough to include the machine in question. In the case of Levins v. City of Chicago, supra, it was argued that the "Magic Roll" had no holes or cups and



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that neither of the devices there considered had arches, pins or springs.

Defendants also contend that the machines are gambling devices prohibited by the Criminal Code and Section 191.5 of the Municipal Code of Chicago. This is based upon the allowance of free play. When a player of a bowling machine rolls a strike, he gets two extra plays, and when he bowls a spare, he gets one extra play, thus giving him prolonged play without the deposit of additional money. While the City cites considerable authority in support of its position, the gambling element seems trivial, much like matching or lagging for pennies, "marbles for keeps," and similar games played by the young. However, it is for the city fathers to decide that question.

The ordinance is directed against the use of these machines "in any place of public resort." The City has broad powers in that respect. It may prohibit the playing of billiards and pool and other amusing games which in the privacy of a man's home are entirely harmless. Village of Atwood v. Otter, 296 Ill. 70. The validity of the ordinance having been determined, it is not for the courts to nullify its application by sanctioning ingenious efforts to circumvent it. We repeat what was said by the late Justice O'Connor in the case of Levins et al. v. City of Chicago, supra. "We have nothing to do with the wisdom or unwisdom of the act of the legis-



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lature or of an ordinance. Courts have one function, the legislative bodies another."

The facts on which our decision is based are not in dispute, and it would serve no useful purpose to remand this case.

Judgment reversed.

Friend, P. J., and Scanlan, J., concur.



341 A  
45061

CHICAGO HOUSING AUTHORITY, )  
Appellant, )

v. )

ELIZABETH IVORY, )  
Appellee. )

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

341 I.A. 2321

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION  
OF THE COURT.

Plaintiff is a municipal corporation organized for the purpose of operating a public low-rent housing project known as the Ida B. Wells Homes. Defendant is a month-to-month tenant of the plaintiff. Having given due notice of termination of the tenancy in accordance with the provisions of the statute of the State of Illinois, plaintiff filed suit for forcible entry and detainer. No ground for such eviction other than termination of the lease was set forth in the notice or urged in court. Defendant contends that grounds other than termination of the lease are essential to her eviction. The lower court found in favor of defendant and from that judgment plaintiff appeals. Under the laws of Illinois, eliminating from consideration federal statutes and rent regulations, there is no question but that plaintiff is entitled to recover. If plaintiff is within the provisions of the Federal Act, however, then as a condition precedent to recovery it must set forth one of the specific grounds for eviction enumerated in the Federal Rent Regulations. (Sec. 825.6 et seq. of the Controlled Housing Rent





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Regulations issued September 1, 1949 by the Office of the Housing Expediter.) Plaintiff says, however, that it is exempt from those provisions by virtue of Sec. 825.6 (g), which provides that the United States or any state or local agency "may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulations under which such accommodations are administered." It has been held specifically that a public agency of the character of the plaintiff is exempt from federal rent control. Medical Center Commission v. Salaway, 334 Ill. App. 78; City of New York v. Salod, 76 N.Y.S. (2d) 306; City of Sioux Falls v. Sona, 35 N.W. (2d) 296; San Diego State College Foundation v. Hasty, 202 P. (2d) 868; Columbus Metropolitan Housing Authority v. Simpson, 85 N.E. (2d) 560.

It is argued that it is arbitrary action for a landlord during the housing shortage to terminate a tenancy without assigning any reason other than that the lease has terminated under its terms. However, plaintiff is a public authority operated not for profit and the exception was undoubtedly made because it was believed by Congress that such an agency would not exercise arbitrary authority, not being motivated by a desire for profit or anything other than the welfare



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of the project itself. We assume that this is the case here.

For the reasons stated herein the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of plaintiff.

Judgment reversed and cause  
remanded with directions.

Scanlan and Friend, JJ., concur.



45023

773 A

MORTON WEINSTEIN,	)	
Appellee,	)	
v.	)	APPEAL FROM SUPERIOR
	)	COURT, COOK COUNTY.
JOHN T. BROWN, and SELZ &	)	
SOUTHMAN, INC., a corporation,	)	
Appellants,	)	
and PAUL WEINSTEIN,	)	
Defendant.	)	341 I.A. 282 <sup>1</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In an action for personal injury, brought by Morton Weinstein against John T. Brown, Selz and Southman, Incorporated, a corporation, and Paul Weinstein, father of the plaintiff, the jury found Paul Weinstein not guilty, Brown, and Selz and Southman, guilty, and assessed damages against them in the sum of \$10,000.00. Judgment was entered on the respective verdicts. Brown, and Selz and Southman have taken an appeal, but no appeal has been prayed from the not-guilty verdict and the judgment thereon with respect to Paul Weinstein.

The essential facts disclose that on September 29, 1943, the date of the accident in question, Brown was the owner of an apartment building at 6227-6239 Drexel avenue in Chicago, and employed Selz and Southman as his agents. They awarded Paul Weinstein, a contractor of many years' experience, the contract for painting the exterior of the building. He supplied his own men and equipment. In the course of operations he attached ropes, pulleys



and scaffolding to the parapet wall of the roof by means of so-called sky hooks in the usual and customary manner. After working part way around the building, he began painting at the front, when suddenly a great number of bricks and some stones fell from the parapet coping and wall to the public sidewalk below and struck plaintiff who had been standing there, inflicting severe injuries.

The last inspection made in 1939 was a superficial one. Defendants' inspector Berglund merely made a visual inspection without testing the strength or condition of the mortar. Berglund testified upon trial that the wall was about two feet high at the point where it broke off and that an examination of the wall immediately following the accident, made at the request of one of the officers of the defendant corporation, disclosed that the mortar was crumbled, "dry and granulated."

Another witness, Dorn, a painter who had attached the sky hooks, stated that about three feet or more of the wall gave way and that the brick on top "was like dust, probably from the mortar that was loose or something."

The original complaint consisting of six counts charged the defendants, Brown, and Selz and Southman, with negligence in permitting the wall to become unsafe and to be defective so that it fell when the scaffolding was attached; in failing to keep the wall in good condi-





tion so as to prevent harm to persons on the sidewalk adjacent to the building; and in using unsafe equipment through their servant Paul Weinstein, their contractor. It also charged Weinstein with carelessly attaching his hooks and scaffold, and carelessly using unsafe equipment.

After plaintiff had put in his testimony, he sought leave to file an amended complaint consisting of only one count instead of what he designates as "the clumsy, repetitious complaint of six counts." The amended complaint alleged sole control of the wall, as before, in the defendants, Brown, and Selz and Southman, charging them with knowledge that the work being done could endanger the lives of persons on the public walk, and charged that defendants "negligently and carelessly maintained, controlled and operated said roof, parapet wall, and coping." Plaintiff's counsel say that their only purpose in filing the amended complaint was to simplify the giving of instructions which would properly set forth the issues to the jury. In effect, the duty and negligence charged were the same in the original and amended complaint, and the answers and denials to the original complaint covered the amended statement of the same charges as to such duties and negligences.

The court granted leave to file the amended complaint, and ordered defendants to have their respective answers stand or to file other answers within five days. Motions of de-



fendants for directed verdict were denied, and the trial then continued with the resultant verdicts. Defendant Weinstein filed a new answer in which he repeated the denials of his original answer, but Brown, and Selz and Southman filed a motion to strike. The court overruled this motion to strike the amended complaint, and their original answer was not withdrawn.

Although the amended complaint charged that Brown, and Selz and Southman had exclusive possession and control of the building, its roof, parapet wall and coping, and that defendant Weinstein was in exclusive control of the hooks, ropes, pulleys and scaffold used by him in the operation of painting, the doctrine of res ipsa loquitur, which the appealing defendants say these allegations suggest, was not invoked or followed by the court, and no instructions on that theory were given.

Upon these facts and pleadings the appealing defendants argue that the instrumentality which caused the injury to plaintiff was not under their exclusive control and care at the time of the occurrence; that they were not negligent in maintaining the parapet wall, roof or coping; and that they had no knowledge and could not reasonably have been expected to have any knowledge that the roof, parapet wall and coping were not in good sound condition. Their counsel say that the evidence was insufficient to prove their negligence within the specific charges



set forth in the original complaint, and that the case was not a proper one for the application of the doctrine of res ipsa loquitur, which they contend was set forth in the amended complaint. It is also urged that the court erred in sending the case to the jury before it was at issue; that their motion to strike the amended complaint and in arrest of judgment should have been allowed; that there was error in the rulings on the evidence and in the instructions to the jury; and that the verdict and judgment are against the evidence.

After a careful examination of the pleadings and a comparison between the allegations contained in the six counts of the original complaint and those of the amended complaint, we are convinced that plaintiff's amended pleading embraced the real and necessary issues in the case, and that defendants' original answers covered every defense and proposition necessary to be considered and determined by the jury. The allegations as to exclusive control of the building by the defendants, Brown, and Selz and Southman, on the one hand, and of the ropes, pulleys, hooks and scaffolding by the contractor Weinstein on the other hand, present no inconsistency. The court instructed the jury that if they believed from the evidence in the case that the parapet wall and coping were in a defective condition, and that the sole proximate cause of the accident and injuries to plaintiff was the defective



condition thereof; and if they further believed from the evidence in the case that defendant Weinstein and his agents did not know of such defective condition of the parapet wall and coping and that it could not be ascertained by them in the exercise of ordinary care and diligence, then plaintiff was not entitled to recover from defendant Weinstein. In another instruction the jury were instructed that plaintiff had the burden of proving by a preponderance of the evidence that defendant Weinstein, as alleged in the amended complaint, carelessly and improperly maintained, controlled and attached ropes, pulleys and scaffolding to the building. These and other instructions required the jury to determine whether it was the negligence of the appealing defendants in permitting the wall to become unsafe and defective and in failing to keep it in good condition so as to prevent harm to persons on the adjacent sidewalk, as charged in the amended complaint; or whether the proximate cause of the accident resulted from the negligence of the contractor Weinstein in carelessly attaching his hooks and scaffold and using unsafe equipment, as also charged in the amended complaint.

In other words, the negligence charged against the two sets of defendants was separate and distinct, and if upon the evidence presented the jury believed that Weinstein did not improperly attach his equipment to the roof, they were justified in exculpating him from liability.





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The only evidence as to Weinstein's actions came from his own testimony and that of his employee Dorn, both of whom testified that the work was properly done in the usual and customary manner, and that the parapet wall and coping appeared to be "all right." This left the question of the liability of the appealing defendants to be determined by the jury. They were charged with negligent maintenance of the roof, wall and coping. Their answer had already denied this charge, and there was some evidence adduced upon the trial, including the inspection of the building four years prior to the accident and the condition of the parapet and coping after the accident, as testified to by Berglund, which presented a question of fact for the jury as to whether or not they were negligent as charged. Since the appealing defendants did not withdraw their original answer or file a new one, the cause was at issue; and the fact that the appealing defendants filed a motion to strike, contrary to the order of the court which directed them to answer, did not prejudice them in their defense of the cause. The issues were clearly made up by pleadings as they were drawn at the time the motion to strike was made, and it was properly within the province of the jury to determine the facts under the instructions of the court. The charge to the jury is not challenged in any of the Points and Authorities in the brief of the appealing defendants, nor is the amount of the verdict



questioned.

Plaintiff sustained severe injuries which have left him permanently disabled. He was present on a public walk where he had a right to be. Either Weinstein the contractor, or the owner and agents of the building were responsible for the collapse of the parapet and coping. The jury found, as a matter of fact, that the negligence of the appealing defendants in maintaining the wall was the proximate cause of the accident. Under the circumstances their contention that the judgment should be reversed contravenes the fundamental principle that the owner of property abutting the public way must use due care to refrain from interfering with the safe use of such highway. Jacob Doll & Sons v. Ribetti, 203 Fed. 593; Andronick v. Daniszewski, 268 Ill. App. 543. The fact that the wall gave way under the weight of the scaffold indicates either that the wall was not properly constructed, or had not been kept in safe condition. In Houlihan v. Sulzberger & Sons Co., 282 Ill. 76, the plaintiff administratrix recovered a judgment in the trial court against the defendant corporation on the ground that it had negligently caused the death of her husband, who had died as the result of a fall from a ladder attached to defendant's building. Decedent had been working on the building as a laborer for a corporation engaged to repair a smokestack on defendant's building, and in the course of his work fell from a



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ladder which was alleged to be defective. Defendant on appeal urged that it was not guilty of a lack of ordinary care in endeavoring to keep the ladder in a safe condition, and offered evidence to the effect that about two months before the accident the ladder had been inspected and painted. In affirming the judgment in favor of plaintiff the court said that "an inspection with a sharp or pointed instrument would have disclosed the condition of these ends [of the ladder, which were rotten]. No such inspection was made. The painter who made the inspection relied wholly upon his jerking the rung with one hand and throwing his weight against it while he held to the upright with the other hand. To say the least, it was a question of fact whether a reasonably thorough inspection of an appliance of this character would not have disclosed its unsafe condition." In the Andronick case, where a workman employed by an independent contractor on a scaffold on the outside of a building abutting the public sidewalk, dropped a chisel which struck plaintiff who was on the walk, judgment against the building owner was sustained on the theory that since the work was hazardous to persons on the highway, the owner was liable for the negligence of the contractor he hired and that he could not escape liability by seeking to throw the blame on the contractor.

In no event would it have been proper for the trial court to grant the directory motions sought by the appealing



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defendants. The jury were properly instructed, the verdicts were consistent with the pleadings, the evidence and the issues involved. The verdict against the appealing defendants is not excessive, and we think the trial was fairly conducted. The judgment of the Superior Court is therefore affirmed.

Judgment affirmed.

Schwartz, P. J., and Scanlan, J., concur.





284 A

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V.

341 I.A. 332

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE

Ellen Glineberg, plaintiff, appeals from an order

On July 20, 1948, plaintiff filed a complaint  
against Clarence B. Evans and Stanley Ross Evans, de-  
fendants, in which she sued to recover damages for  
injuries sustained by her when she was struck by an  
automobile, alleged to have been driven by defendant  
Stanley Ross Evans, while she was crossing Sherman avenue  
at its intersection with Gaffield Place in the city of  
Evanston, Cook county, Illinois. No service was ob-  
tained by the sheriff on the original summons and on  
July 24, 1948, plaintiff took out an alias summons  
and placed it in the hands of the sheriff with directions  
to serve said defendant at 820 Ridge Terrace, Evanston,  
Illinois. The sheriff made the following return of  
service upon the alias summons:

"I certify that I served the within writ on the  
 nt Stanley Ross Evans by leaving a copy of the  
 his usual place of abode in my county, with



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Mrs. Evans (Mother) a person of his family of the age of ten years or upwards and informing such person of the contents thereof, on the 6th day of October 1948 and also by sending through the United States Post Office, on the 6th day of October 1948 a copy of the within writ in a sealed envelope, with postage fully prepaid addressed to the said defendant at such usual place of abode.

"Elmer Michael Walsh, Sheriff, by Thude Deputy"

On November 1, 1948, the special appearance of said defendant was entered by his attorneys, Braun, Johnson and Ryan, for the sole purpose of questioning the jurisdiction of the court over the person of said defendant. On December 2, 1948, a motion to quash service as to said defendant was filed, which recites:

"1. That the purported service of summons was on the mother of this defendant on October 6, 1948 at the former residence of this defendant at 820 Ridge Terrace, Evanston, Illinois.

"2. That the said service was not in accordance with the statute made in such case and provided, in that the above address was not the usual place of abode of this defendant, but on the contrary thereto, this defendant was residing at the time of the said service in Palo Alto, California, where this defendant had his abode prior to October 6, 1948."



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An affidavit made by Philip E. Ryan, a member of said law firm, and attached to the motion, states that upon information and belief the facts contained in the motion are true. Upon the hearing of the motion the evidence of defendant's mother proved conclusively that at the time of the service of the alias summons Stanley Ross Evans, defendant, was not residing in California and the defendant was therefore forced to abandon the original motion to quash, and on April 26, 1949, an amended motion to quash the service was filed, which states that at the time of the service of the summons upon the mother of the defendant on October 6, 1948, at the former residence and abode of the defendant at 820 Ridge Terrace, Evanston, Illinois, the defendant "had abandoned and given up the above address as his residence and abode sometime prior to the purported service of summons upon his mother, and in support thereof, this defendant refers the Court to the testimony of Mrs. Louise Evans, the mother of this defendant, who appeared before this Court and testified on January 21, 1949." The amended motion was verified by Attorney Philip E. Ryan, who verified the original motion. Plaintiff filed an answer to the amended motion, which avers, inter alia, that 820 Ridge Terrace, Evanston, Illinois, was the residence and abode of the defendant Stanley Ross Evans on October 4, 1948, and also on October 6, 1948, and denies that the defendant had abandoned and



given up the said place as his residence and abode on the date of the service of the summons made by the sheriff, and denies that the said defendant had any other place of residence or abode on October 6, 1948, than 820 Ridge Terrace, Evanston, Illinois. In support of the said answer the affidavit of John E. Erickson, plaintiff's attorney, was filed, which states, inter alia, that late in the afternoon of Saturday, October 2, 1948, he called at the home of the defendant Stanley Ross Evans at 820 Ridge Terrace, Evanston, Illinois, which place was then the residence, home and usual abode of the said Stanley Ross Evans; that upon ringing the doorbell the said defendant responded thereto and admitted affiant into the living room of the residence; that the affiant then stated to said Evans that he had come to talk over and discuss with him the facts concerning the claim and pending suit of Ellen Glineberg; that he stated to said Evans that he, Evans, had previous information and knowledge of the claim from a letter written by the affiant to him on February 11, 1948, and also from the service of an attorney's lien notice; that said Evans thereupon replied that he did not care to answer any questions nor to discuss the facts and circumstances of plaintiff's claim and suit against him; that at said time and conversation said Evans said nothing to affiant as to any intention to leave the State of Illinois or his then place of residence and abode, or the jurisdic-





tion of the court.

At the hearing upon the motion to quash, Mrs. Clarence Evans [Mrs. Louise Evans], the mother of Stanley Ross Evans, testified that Stanley was twenty-eight years of age; that he had graduated from the Harvard Law School in September, 1948; that on October 6, 1948, the sheriff left with her the summons for Stanley; that at that time Stanley "was on his way to the West Coast"; that when he reached California he had no employment there but started looking for it as soon as he got there and that he got work within a week, working for a judge of the Appellate Court; that his purpose in going to the Coast was to make his home there; that he is now with his wife's people and will remain there until he takes the California bar examination; that "he never had any permanent address except my home"; that he was a registered voter in Evanston; that he left the home at 10:30 A. M., October 4, and she rode with him as far as Elgin; that up to October 4, 1948, her home at 820 Ridge Terrace, Evanston, Illinois, had been his residence and usual place of abode; that "when he was here, when the accident occurred he had been in California, looking over the prospects there and then came on here and looked here, and during the summer he decided he would go to California"; that on October 6, "he was en route to California by automobile"; that he took along in the automobile clothing and personal effects, household things, linens and so forth,



wedding presents; that he was driving a Plymouth sedan; that she understands that when they reached California on Saturday, October 9, they went to stay with people by the name of Stober, in Palo Alto, "until the Bar Association [examination] in the spring, and I imagine that's April."

Plaintiff contends that the court erred in entering the order of May 3, 1949, "that the service of the said summons be quashed." The defendant contends that defendant "had abandoned and given up his usual place of abode two days prior to the service on his mother. From the moment he left with his possessions, it was his former residence or place of abode."

The Service of Process statute of this State (Ch. 110, par. 137, sec. 13, Ill. Rev. Stat. 1947) provides:

"Except as otherwise expressly provided herein, service of summons upon an individual defendant in any civil action shall be made (1) by leaving a copy thereof with the defendant personally or (2) by leaving such copy at his usual place of abode, with some person of the family, of the age of ten years or upwards, and informing such person of the contents thereof, provided that the officer making such service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at such usual place of abode; the certificate of such officer that he has sent such copy in pursuance of this section shall be evidence that



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he has done so."

It must be noted that defendant Stanley Ross Evans did not verify either the original or the amended motion to quash, nor did he give evidence of any kind upon the hearing of the motion although the original motion to quash was filed December 2, 1948, and the order of the court quashing the service of summons was not entered until May 3, 1949. It must also be noted that the testimony of defendant's mother as to his intentions and his actions after he left home was of a hearsay nature and that she drew conclusions therefrom; that none of the letters that she is presumed to have received from defendant were introduced in evidence. Counsel for the defendant state that they do not contend that "his automobile was his usual place of abode at the time of the alleged service." They are driven to the position that when he left his home in the automobile he then had no usual place of abode.

In Botna Val. State Bank v. Silver City Bank, 54 N. W. 472, wherein a service of summons akin to the instant service was present, the court states (p. 473):

"The law is well settled that, where a residence is once established, it continues until there is an actual change of habitation, with an intention to make a new residence. When a residence is once acquired, it is presumed to continue until there is satisfactory evidence that it has been abandoned. Hinds v. Hinds, 1 Iowa 36;



Nugent v. Bates, 51 Iowa 77, 50 N. W. Rep. 76; Cohen v. Daniels, 25 Iowa 88; State v. Groome, 10 Iowa 308; Love v. Cherry, 24 Iowa 204; Vanderpoel v. O'Hanlon, 53 Iowa 246, 5 N. W. Rep. 119; Fry's Election Case, 71 Pa. St. 302."

The foregoing statement of law was cited with approval in the case of Ruth & Clark v. Emery, 11 N. W. 2d 397, 400.

In Vanderpoel v. O'Hanlon, 53 Iowa 246, which involved the question as to the right of a student in college to vote at a certain election, the court states (pp. 248, 249):

"It is undoubtedly true that the residence of the plaintiff was in Mitchell county at the time he first went to Iowa City, and it must be equally true that it so continued until he acquired another. \* \* \* If a person leaves the place of his residence or home with intent of residing in some other place and making it his fixed place of residence, but never consummates such intent, it cannot be said his residence has been changed thereby. But if he so intends, and does actually become a resident of another place, then the former residence will be regarded as abandoned and a new one acquired. The intent and the fact must concur. Hinds v. Hinds, 1 Iowa 36; The State v. Minnick, 15 Iowa 123; the opinion of the judges in 5 Met., 587; Fry's Election Case, 71 Penn. St. 302."





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Under the foregoing authorities and the admitted facts the service of summons by the sheriff in the instant case was a valid one, and we so hold. We are satisfied that justice will be served by that ruling.

The purpose of a summons is to notify a party to appear in a certain court at a certain time to answer a complaint made against him, and the defendant admits that he had knowledge of the service made by the sheriff. In fact, it appears from the record that defendant received from his mother the copy of the summons that had been left with her by the sheriff so promptly that he had ample time in which to file an answer to the complaint if he had seen fit to do so. The shifty nature of defendant's attack upon the summons clearly appears from the record. He first took the position that the defendant "was residing at the time of the said service in Palo Alto, California, where this defendant had his abode prior to October 6, 1948," but the testimony of the mother compelled the abandonment of this position and defendant was then forced to take the position that when he drove away in his automobile from his old home on October 4, 1948, he abandoned and gave it up as his usual place of abode. The defendant left his home on October 4, 1948, about thirty-six hours after his talk with the attorney for plaintiff. The accident occurred in Cook county, where plaintiff and the defendant lived. To sustain defendant's attack upon the service of the summons might



NO. 10400

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, A. D. 1950

341 I.A. 333

ANNA CASWELL, as Administratrix of  
the estate of Russell Charles Caswell,  
deceased,

Plaintiff-Appellee,

vs.

LOUIS L. SMITH,

Defendant-Appellant.

) Appeal from the  
) Circuit Court of  
) Lake County.  
)  
)  
) Honorable  
) Ralph J. Dady,  
) Judge Presiding.

BRISTOW, J. -- This case was tried in the Circuit Court of Lake County, Illinois, wherein the plaintiff, Anna Caswell, as Administratrix of the estate of her husband, Russell Charles Caswell, recovered a judgment in the sum of \$7500 against Louis L. Smith, who was charged with responsibility under the Guest Statute for the alleged wrongful death of decedent.

The cause was heard by a jury. Motion for new trial and for judgment non obstante veredicto were overruled and this appeal followed.

Many errors are urged, the principal ones being (1) Is there sufficient evidence to justify a jury in their determination that the defendant was guilty of wanton and wilful misconduct? (2) Was there reversible error committed by the trial judge in his several rulings on the admissibility of evidence? (3) Was there reversible error in the giving and refusing of certain instructions?

This appears to be a fair picture of the factual situation surrounding the automobile accident which caused the death of Russell Charles Caswell. Plaintiff and her deceased husband were passengers in

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1933

Appeal from the Circuit Court of Lake County, Illinois, John J. Brady, Judge Presiding.	vs. Plaintiff-Appellee, ANNA CASWELL, as Administratrix of the estate of Russell Charles Caswell, deceased, Defendant-Appellant.	LOUIS L. SMITH,
--	---	-----------------

BRISTOW, J. -- This case was tried in the Circuit Court of Lake County, Illinois, wherein the plaintiff, Anna Caswell, as Administratrix of the estate of her husband, Russell Charles Caswell, recovered a judgment in the sum of \$7500 against Louis L. Smith, who was charged with responsibility under the Guest Statute for the alleged wrongful death of defendant. The case was heard by a jury. Motion for new trial and for judgment non obstante veredicto were overruled and this appeal followed.

Many errors are urged, the principal ones being (1) Is there sufficient evidence to justify a jury in their determination that the defendant was guilty of wanton and willful misconduct? (2) Was there reversible error committed by the trial judge in his several rulings on the admissibility of evidence? (3) Was there reversible error in the giving and refusing of certain instructions?

This appears to be a fair picture of the factual situation surrounding the automobile accident which caused the death of Russell Charles Caswell. Plaintiff and her deceased husband were passengers in

defendant's car which was being driven by the defendant in an easterly direction on highway 120. On April 11, 1948, the plaintiff's family lived in a cottage at Round Lake, Illinois. Her husband, a private chauffeur, was 54 years old. On the day of the fatal accident, defendant, also a private chauffeur, and his wife drove from Chicago to the plaintiff's home for a friendly visit. About five o'clock in the afternoon, Mr. and Mrs. Smith, riding in the front seat, and Mr. and Mrs. Caswell, riding in the rear seat, started for Chicago.

According to witnesses appearing on behalf of plaintiff, the defendant failed to respect a stop sign at Hainesville corner as he entered upon highway 120. From then on for a distance of three-fourths of a mile, to the place of the accident, he was speeding, weaving in and out of the traffic, travelling about 55 miles per hour in a 35 miles per hour zone, passing a car on a curve contrary to warning signs and in doing so immediately before the accident, turned so sharply that he lost control of his car, skidded about 75 feet, leaving in the path a demolished sign post made of metal containing "35 MPH Speed Limit"; also a broken culvert and a telephone pole dangling, the lower half being completely severed, the upper half remaining attached to the wires and swinging in mid-air. The car was completely demolished. This version of the occurrence finds support in the testimony of several witnesses. On the contrary the defendant, testifying in his own behalf, denies emphatically all the charges of recklessness; says he was travelling at a moderate rate of speed; passing automobile on a curve but at no time operating his automobile at an excessive speed; that in passing a car on the last curve he encountered an automobile coming from the opposite direction which side-swiped his car, whereupon he lost control and the accident ensued. The defendant, in his deposition, had made some statement<sup>4</sup> not entirely consistent with his account at the trial. Likewise Mrs. Caswell was questioned about the accident in the presence of a court reporter the day following the accident while she was confined in the hospital. She allegedly told the court reporter on

defendant's car which was being driven by the defendant in a southerly direction on highway 130. On April 11, 1946, the plaintiff is testifying that in a cottage at Round Lake, Illinois, her husband, defendant, who was 54 years old. On the day of the fatal accident, defendant, who was a private chauffeur, and his wife drove from Chicago to the plaintiff's home for a birthday visit. About five o'clock in the afternoon, Mr. and Mrs. Smith, riding in the front seat, and Mr. and Mrs. Caswell, riding in the rear seat, started for Chicago.

According to witness's explanation of recall of plaintiff, the defendant failed to respect a stop sign at a certain intersection and entered upon highway 130. From that point a distance of three-fourths of a mile, to the place of the accident, it was suggested, defendant and out of the traffic, traveling about 35 miles per hour in a 15 miles per hour zone, passing a car on a curve contrary to warning signs and in doing so immediately before the accident, turned so sharply that he lost control of his car, skidded about 75 feet, leaving in the path a demolished sign post made of metal containing 225 MPH speed limit; also a broken culvert and a telephone pole hanging; the lower half being completely severed, the upper half remaining attached to the wire and awl wire in mid-air. The car was completely demolished. This version of the accident, which is in the testimony of several witnesses, on the contrary to the defendant, testifying in his own behalf, denies categorically all the charges of recklessness; says he was traveling at a moderate rate of speed; passing automobile on a curve but at no time operating his automobile as an excessive speed; that in passing a car on the last curve he encountered an automobile coming from the opposite direction which side-swiped his car, whereupon he lost control and the accident ensued. The defendant, in his deposition, had made some statement not entirely consistent with his account at the trial. Likewise Mrs. Caswell was questioned about the accident in the presence of a court reporter the day following the accident while she was confined in the hospital. She allegedly told the court reporter on

that occasion that the defendant's car was shoved off the road by another car coming toward them that looked like a "bull dozer".

The defendant, on this appeal, stresses very strongly the injustice that developed as a result of the jury believing what Mrs. Caswell told them on the witness stand rather than subscribing to what she told the investigator in the presence of a court reporter at the hospital within 24 hours of the happening of the accident. The defendant argues persuasively that her memory, being fresh and undisturbed by the lapse of time, was better at the hospital. Mrs. Caswell testified at the trial that she did not remember telling the court reporter anything about the accident; that she was receiving hypos every three hours and that she did not remember clearly anything that was said.

Henry Cash, a resident of Round Lake, and being unacquainted with any of the parties to the litigation, testified. He apparently was the one who was driving his car toward the defendant at the time of the occurrence in question. He testified that when he was about two blocks west of Grays Lake and about one hundred yards from the curve in question, he saw a car coming, seemingly out of control and taking the whole road in; that realizing the impending danger, he stopped and even backed up a few feet; that the defendant's car just missed his fender, proceeded across the road, turned a somersault, struck a telephone post and broke it into. He further said that he saw no automobile side-swipe defendant's car.

Viewing the foregoing recital of facts and construing them most favorably for the plaintiff, we are of the opinion that the trial court was obliged to submit to the jury the issue of whether the defendant was guilty of wanton and wilful misconduct. Furthermore, we are not in a position to disapprove of the jury's determination in the cause. They saw and heard the witnesses. The trial court had this advantage and he approved of the jury's finding. A careful reading of the record indicates very clearly that the plaintiff is entitled to recover.





With great enterprise appellant has sought to magnify the importance and adverse effect of several alleged errors committed by the trial court in the course of the trial. In the main, their criticisms are without merit. We are confident that the result would be no different if it were tried according to appellant's pattern of perfection. This case was handled by counsel for plaintiff and defendant in an able and aggressive manner. It is too much to expect that the record be entirely free of some error. But we fail to find any error that would justify reversal. The verdict and judgment herein represents substantial justice. We would have difficulty approving any different result. It should not be disturbed.

Judgment Affirmed.

With great attention, the...  
importance and adverse effect of...  
trial court in the course of the trial. In...  
without merit. The...  
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It is...

45118

C. L. KRAMER,

Appellee,

v.

STELLA GINGER and EDWARD  
GINGER,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

341 I.A. 368

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order striking their amended petition which prayed that a decree of sale and the decree confirming the sale in a foreclosure proceeding be set aside on the ground that it was entered while defendants were in military service. Defendants appealed directly to the Supreme Court of Illinois (Kramer v. Ginger, 405 Ill. 17) where the cause was ordered transferred to this court.

The amended petition alleges that the parents of the petitioners, Frank Jendrezjek and Stella Jendrezjek, his wife, who used the surname of Ginger, were the owners as joint tenants of certain premises in the City of Chicago; that about March 14, 1929 they executed a principal promissory note for the sum of five thousand dollars due three years after date, and to secure the payment of the note executed a trust deed covering the premises in controversy; that on July 5, 1933 a divorce decree was entered which provided that Stella Ginger convey to Frank Ginger her right, title and interest in the premises here involved; "that while said conveyance was never actually made, the effect of the aforesaid decree was to vest absolute title



in Frank Ginger"; that on February 3, 1937 Frank Ginger died intestate leaving him surviving as his only heirs at law the petitioners herein and three other children; and that by virtue of the death of Frank Ginger the heirs at law became vested with the title to the real estate in question.

The petition further alleges that the petitioner Frank James Ginger was in the military service from March 27, 1943 until December 2, 1945; that petitioner Edward Ginger served in the military forces from March 17, 1941 until March 17, 1946; that James Ginger resided in the premises here involved from the time of his discharge from the armed services on December 2, 1945 until about March 1, 1946; that James Ginger on or about January 4, 1949 was informed of the filing of the foreclosure proceeding, the entry of the decree of sale, and the sale of the property to plaintiff and the issuance to him of a master's deed; that at the time of filing of the foreclosure proceeding and service of the alleged summons upon the petitioners they were both in military service; that the foreclosure decree was entered on the affidavit of military service filed August 9, 1945 which recited that Sylvia Ginger, one of the heirs at law, was not in the military service of the United States and that no reference was made in the affidavit to the petitioners; that the complaint filed in the foreclosure proceeding shows on its face that the cause of action was barred by the statutes of limitation.



The petition concludes with a prayer that the foreclosure decree, and the decree confirming the sale be vacated; that the amended petition stand as an answer to the original foreclosure complaint; and that the court direct Stella Ginger, mother of the petitioners, to comply with the divorce decree entered July 5, 1933 in the Superior Court of Cook County.

In his motion to strike the amended petition plaintiff alleges that petitioners have failed to avail themselves of the relief provided for in paragraph 4 of section 200 of the Soldiers and Sailors Civil Relief Act of 1940 within the time prescribed by the Act, and that it does not appear from the amended petition that the defendants have any legal or equitable interest in the premises here involved.

At the time the decrees in the foreclosure proceedings were entered in 1945 both defendants were in the military service. The affidavit filed by plaintiff in that proceeding did not state whether either of defendants was in the military service, nor does it appear that plaintiff secured an order of court directing the entry of the foreclosure decrees as provided in paragraph 1, section 2 of the Soldiers and Sailors Civil Relief Act of 1940, 50 USCA, appendix 520.

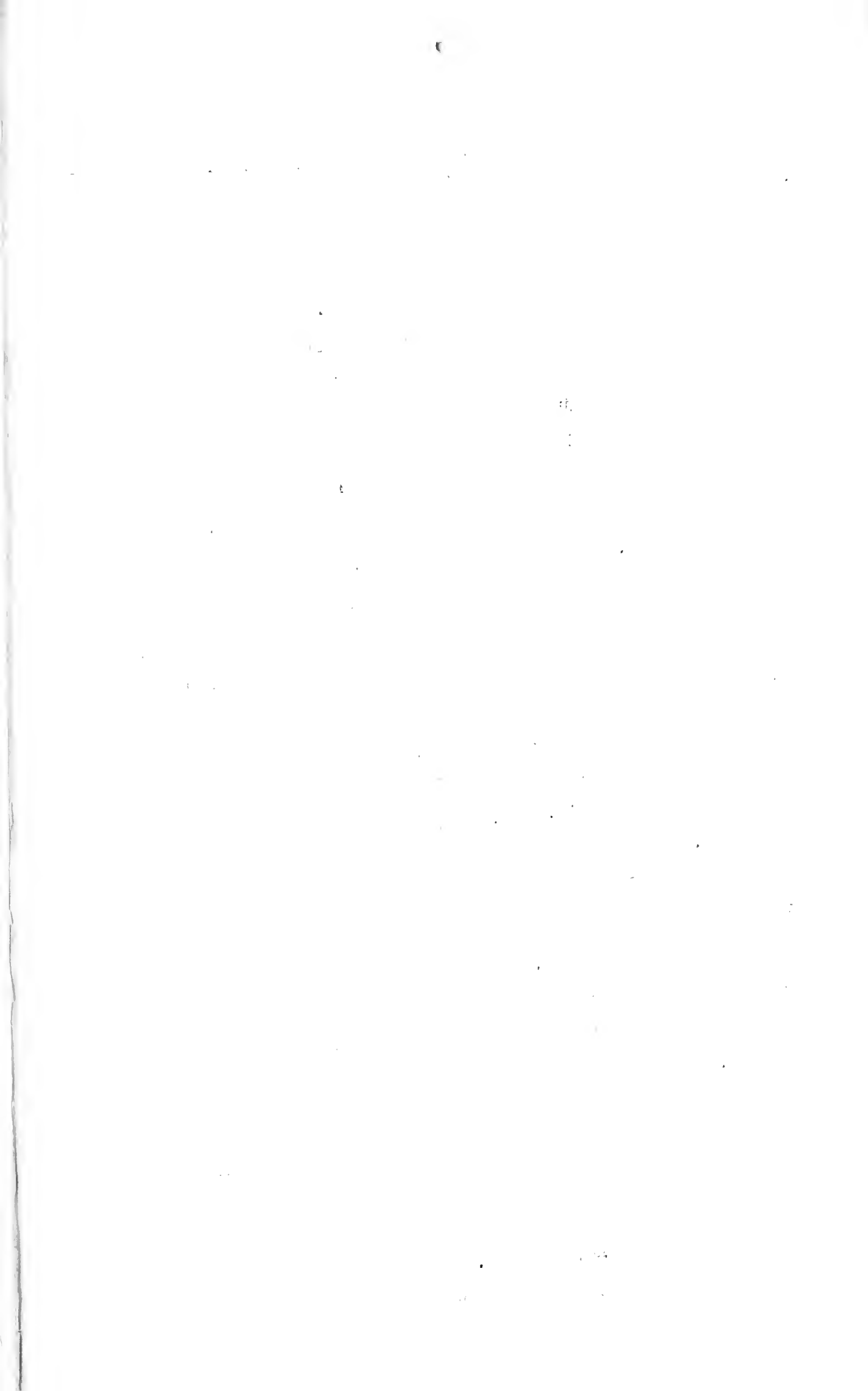
Defendants argue that the omission of their names in the affidavit filed in the foreclosure proceedings led the trial court to believe that they were not in the military service when the decrees were entered and that





this constituted a fraud upon the court. Plaintiff contends that section 200 of the Soldiers and Sailors Civil Relief Act requiring the filing of an affidavit as to military service before a judgment by default can be entered is not jurisdictional.

For the purpose of plaintiff's motion to strike we must consider the allegations of the defendants' petition as being true. The petition alleges that information with respect to the institution of foreclosure proceedings first came to the knowledge of defendants on or about January 4, 1949. The Soldiers and Sailors Civil Relief Act of 1940 is substantially a re-enactment of the former act of 1918 bearing the same title. See Boone v. Lightner, 319 U. S. 561. In support of their position they cite Schroeder v. Levy, et al., 222 Ill. App. 252, and cases in other jurisdictions. The Schroeder case last cited appears to be the only case in Illinois where a court of review had occasion to construe paragraphs 1 and 4 of section 200 of the Soldiers and Sailors act of 1918, which is a counterpart of the present act. There judgment was entered against defendants for want of appearance after they were duly served with summons. As ground for reversal defendants urged that the judgment could not be entered without an affidavit that they were not in military service, or in the absence of such an affidavit or an order of court directing the entry of judgment as required by paragraph 1, section 200 of the Soldiers and Sailors Relief Act of 1918. The court held that the judgment was valid notwithstanding the failure to comply



-5-

with the requirements of paragraph 1 and that these requirements are not jurisdictional. To the same effect are Allen v. Allen, 182 P2 551; Mims Bros. v. N. A. James, Inc., 174 SW2 276; and Snapp v. Scott, 167 P2 870. From a reading of the Schroeder case it appears that the record failed to show the ground upon which defendants moved to vacate the judgment. We think the Schroeder case is readily distinguishable from the present case where the petition sets forth the grounds to vacate the decrees and it does not appear that defendants were duly served with process in the foreclosure proceedings.

In their petition defendants allege that "at the time of service of the alleged summons upon the petitioners, they were both in military service." Plaintiff insists that this allegation is an admission of service of process and even if the service was defective it was notice of the pendency of the foreclosure suit. Whether the summons or service was defective is not clear from a reading of the petition but the petition does allege that knowledge of the foreclosure proceedings first came to defendants in January 1949, after the plaintiff had made a demand for rent in December of 1948 from defendants' sister, Sylvia Ginger, who lived in the premises here in controversy. Assuming, as we must, that defendants first learned of the foreclosure proceedings in 1949, we think that the purpose of the Soldiers and Sailors Civil Relief Act would be defeated by requiring a strict compliance with the provisions of Paragraph 4 of Section 200 where, as here, it appears that



plaintiff failed to comply with the provisions of Paragraph 1 by not filing a proper affidavit or securing an order of court and having an attorney appointed to protect the interests of defendants. Under these circumstances, since the petition was filed within ninety days from the time defendants first received knowledge of the foreclosure proceedings, we hold that it was filed in apt time.

Plaintiff contends that the amended petition does not disclose that defendants have any interest in the subject matter of the litigation. The petition alleges that the parents of defendants held the title as joint tenants and that the divorce decree directed Stella Ginger to convey all of her right, title and interest in the premises to her husband Frank Ginger who died intestate in 1937. On oral argument before this court plaintiff's counsel asserted that the premises were not conveyed to Frank Ginger because he failed to make certain payments to Stella Ginger as provided in the decree of divorce. Noncompliance, if any, with the terms of the divorce decree which resulted in the failure to make a conveyance is not before us on plaintiff's motion to strike. We think that the petition shows that defendants as heirs at law of Frank Ginger, deceased, acquired an equitable interest in the premises here involved and that there is a privity of estate. (Ward v. Sampson, 395 Ill. 353.) While it is true, as plaintiff maintains, that the divorce decree did not operate as a conveyance of an estate (Lipe v. Lipe, 327 Ill. 39), defendants may, under the authority of



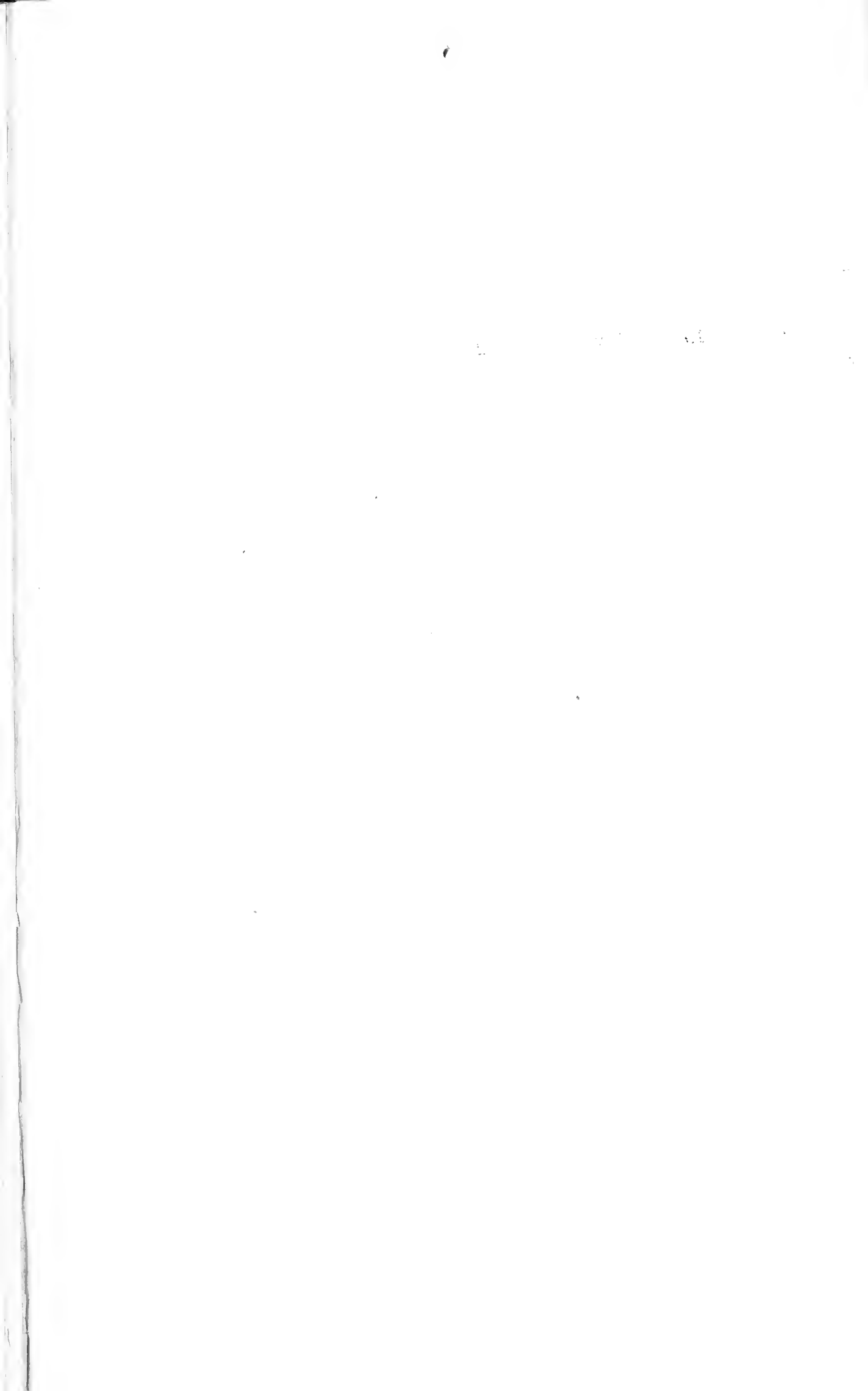
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Ward v. Sampson, institute proceedings to carry out the terms of the divorce decree which would vest the legal title in them.

For the reasons stated, the order appealed from striking the amended petition of defendants is reversed and the cause remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED  
WITH DIRECTIONS.

BURKE AND KILEY, JJ. CONCUR.





45102

PEOPLE OF THE STATE OF ILLINOIS, )

Defendant in Error, )

v. )

JOSEPH PLOCAR, )

Plaintiff in Error. )

ERROR TO

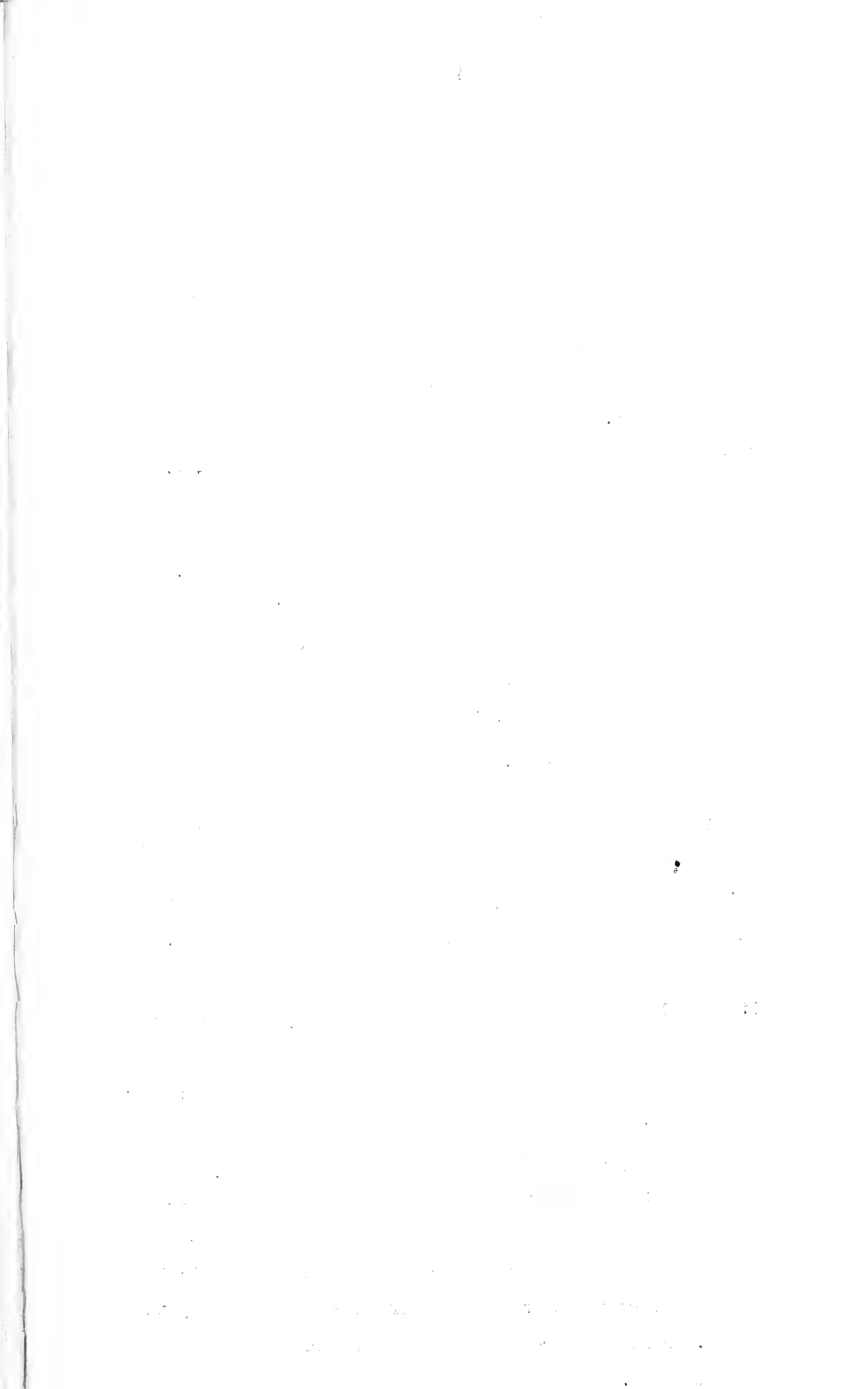
MUNICIPAL COURT

OF CHICAGO

341 I.A. 369

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An information filed in the Municipal Court of Chicago charged that Joseph Plocar on March 8, 1949, at Chicago, Cook County, Illinois, "did unlawfully, knowingly and wilfully encourage Iris Castle, a female under the age of 18 years to-wit: 15 years of age, to be or to become a delinquent child, and did then and there unlawfully, knowingly and wilfully do acts which directly produced and contributed to conditions which tended to render said Iris Castle to be or become a delinquent child in that he, the said Joseph Plocar, on the 8th day of March, 1949, at the intersection of Spaulding and Cermak Road in the City of Chicago, County of Cook, State of Illinois, did ask the said Iris to get into his automobile offering her two dollars to have a good time, in violation of Sec. 104, Chapter 38, of the Illinois Revised Statutes." On being arraigned defendant entered a plea of "not guilty." He waived a trial by jury. The court found him guilty in manner and form as charged in the information and entered judgment sentencing him to serve a term of 90 days in the House of Correction in the City of Chicago and to pay the costs. Defendant prosecutes a writ of error to reverse the judgment.



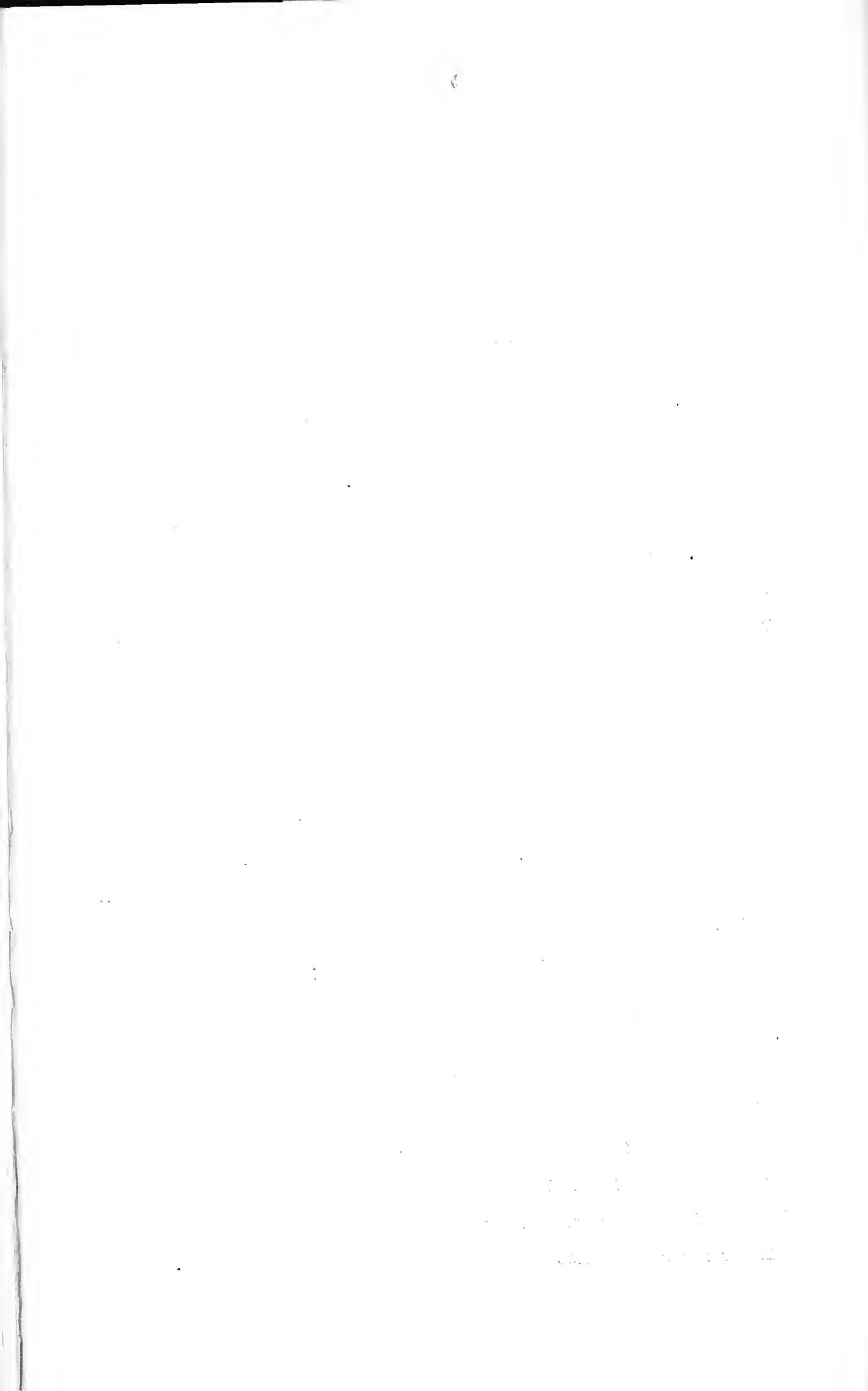
No court reporter was present at the trial. The following statement of facts was agreed upon by the State's Attorney and the attorney for the defendant as the testimony introduced. Iris Castle, called as a witness for the People, testified that she was 15 years of age and a student in the seventh grade of grammar school; that at about 9:30 p.m. March 8th she was mailing a letter at the corner of 22nd and Sawyer Avenue; that it was dark at the time; that a car approached and a man beckoned to her, mumbling something that she didn't understand; that she hurried toward her home at 2440 South Sawyer Avenue; that as she was running up the steps of her home an automobile stopped in front of her house and the driver beckoned to her; that she thought the person was lost and approached the automobile with the intention of offering him help; that as she came near the car, the man behind the wheel whom she recognized as the same man she previously saw at the corner of 22nd and Sawyer Avenue said: "Would you like to take a ride and have a good time? I'll give you two dollars"; that she walked behind the car, took the license number, ran to her home, wrote the number down on a piece of paper and called her mother; that the next morning her mother reported the incident to the police; that she and her mother went to the Lawndale Station the next day and saw several men lined up, some of whom she later recognized as policemen; that she recognized the defendant as the man who spoke to her on the night of March 8, 1949; and that she did not point him out at the time. In court she identified the defendant as the man who spoke to her. Mrs. Irma Castle, the mother of the prosecutrix, testified that her daughter was born December 13, 1933.



William Balswick, called as a witness for the People, testified that he is a captain in the Chicago police force, in command of the so-called "Scotland Yard" Investigation Detail; that he was acquainted with the defendant who had served under him since September, 1948; that defendant was assigned to light duty at the station because of injuries sustained in an automobile accident he had been in "about a year ago"; and that witness had two conversations with defendant, one at the Lawndale Police Station and the other at the Sex Bureau of the State's Attorney's office in the presence of State's Attorney Kinnally, in which defendant admitted he was in the vicinity of 22nd and Sawyer Avenue, Chicago, on the night of March 8, 1949, had spoken to Iris Castle and had asked her to get into his automobile and that he was going to take her out and show her a good time. On cross-examination, Captain Balswick testified that the defendant had at all times denied offering Iris Castle any money; that defendant said he lived in the neighborhood of 22nd and Sawyer Avenue for 15 years; that on the evening of March 8th he had dropped his wife off at a beauty parlor near 22nd and Sawyer Avenue; that he had taken his car to a garage in the neighborhood to have his carburetor adjusted; that defendant said that he told witness that as he was leaving the garage he saw this girl whom he thought he recognized as the daughter of a friend of his in that neighborhood; and that although it is customary to reduce the statements of suspects to writing, it was not done in this case.



Matt Mandernach, called by the People, testified that he is a lieutenant assigned to the Lawndale Police District; that he questioned defendant on March 10th regarding a complaint that a man had been molesting girls in the neighborhood of 22nd and Sawyer Avenue; and that during the conversation defendant offered him \$50 to take the "heat off him." On cross-examination, witness testified that at no time prior to this conversation had he spoken to the girl in this case or her mother, or to any other officer investigating this matter, and that his only knowledge of the charge was what he read in the station complaint blotter that a man was molesting girls in the neighborhood of 22nd and Sawyer Avenue. He testified that he knew nothing further of the matter and did not know at the time that the defendant was in anywise involved. Police Officer Smith, called by the People, testified that he was in charge of the investigation of the complaint that girls were being molested in the neighborhood of 22nd and Sawyer Avenue; that he talked to the defendant, who stated to him that he had been in that vicinity on the night of March 8th and gave as his reason for being there that he had dropped his wife off at the hair dressers near that corner and had gone to a garage to have his car fixed; that it was dark as he left the garage; that he saw a girl mailing a letter at the corner; and that he thought he recognized her as the daughter of a friend of his from that neighborhood and wished to drive her home.





The defendant testified that he lived at 1628 South Harding Avenue with his wife and child; that he had formerly lived in the neighborhood of 22nd and Sawyer Avenue for 15 years; that for 19½ years he had been a member "and still is a member of the police force of the City of Chicago, and has never been called before the Police Trial Board for infraction of police rules and regulations"; that in April, 1948, he was involved in an automobile accident and sustained a concussion of the brain; that he is under the care of a physician; that in September, 1948, he reported back for duty; that on account of his injuries he was assigned to light duty at the so-called "Scotland Yard" Investigation Detail of the Chicago police force; that on the night of March 8, 1949, he had dropped his wife off at a beauty parlor near 22nd and Sawyer Avenue; that he pulled his car into a garage that he had patronized when his car needed repairs to have his carburetor adjusted; that when the work was done and as he left the garage he noticed the complaining witness at a mail box at the corner about to mail a letter; that he thought he recognized her as the daughter of a milk wagon driver friend of his and asked her if he could drive her home; that she said "No"; that he then picked up his wife at the beauty parlor and drove to his own home. He further testified that he was in the vicinity of 22nd and Sawyer Avenue and saw the complaining witness, but denied that he offered her two dollars or any other sum of money to have a good time; that he has always denied the accusation with regard to the offer of money; that Captain Balswick did not reduce to writing any



of the questions and his answers to them; that there was a "show up" at the station in which he participated and at which the complaining witness was present, but that there was no identification made by her in his presence; that he denied he offered Lieutenant Mandernach \$50 or any other sum of money to "take the heat off him," as at the time he had the conversation with the lieutenant he did not know of any charge having been placed against him; and that he had no reason to offer the lieutenant \$50 since the lieutenant did not know what the investigation was about.

Defendant maintains that the information is defective in that it does not set out facts necessary to constitute a violation of the statute. The information alleges that defendant "did ask the said Iris to get into his automobile offering her two dollars to have a good time, in violation of Sec. 104 Chapter 38 of the Illinois Revised Statutes." In People v. Ostrowski, 402 Ill. 106, it was held that an indecent, obscene or lascivious conversation with a child was sufficient to charge the offense. In our opinion the information sufficiently charged a violation of the statute.

Defendant urges that the evidence fails to support the finding of guilty and that there is a reasonable doubt of his guilt. We have set out the evidence in accordance with the stipulation of the parties. It is manifest from this evidence that the trial judge was right in finding the defendant guilty. Our view is that there is no reasonable doubt as to defendant's guilt.

For the reasons stated the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.



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Abt.

341 I.A. 382

# 311A.193

Appeal from  
Circuit Court,  
Peoria County.

Honorable

Joseph E. Daily,  
Judge Presiding.

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The original complaint, consisting of three counts, was filed on December 24, 1943, against Vernon E. Ewers and Ralph Ewers. It charged that Vernon Ewers was acting as the agent

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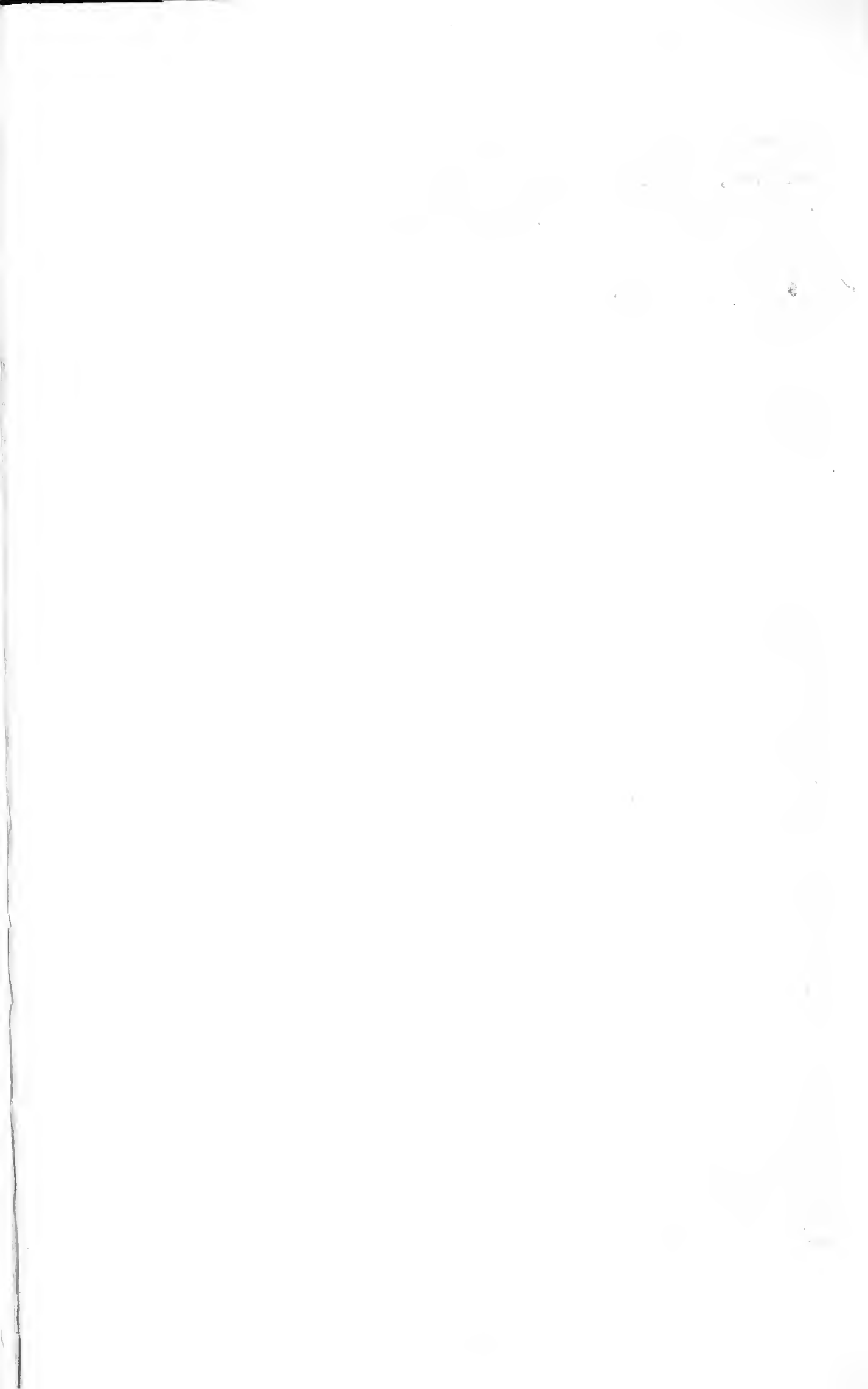
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of Ralph Ewers, but the court, at the close of plaintiff's evidence, directed a verdict in favor of Ralph Ewers. No issue is raised on this appeal questioning the propriety of this determination. The complaint charged wanton and willful misconduct, excessive speed, and failure on the part of the defendant to keep a proper lookout.

Vernon Ewers was not served with summons until October, 1946, whereupon he filed a motion to dismiss the complaint, which motion the trial court allowed. An amended complaint was filed on April 16, 1947, which alleged in substance that on January 20, 1943 at 1:15 A. M. plaintiff, as a pedestrian, was walking across South Adams Street in the City of Peoria on the southerly crosswalk at the intersection of Adams and Walnut streets, which intersection was in the closely built up business district, when he was struck by a car being driven by Vernon E. Ewers. The following acts of negligence were charged in the complaint: (a) In driving said automobile in the left half of the road; (b) In failing to give audible warning with his horn; (c) In running and operating said automobile without proper lights thereon; (d) In operating said automobile along the public highway and while approaching and crossing an intersection in a closely built-up business section of said City of Peoria at an excessive rate of speed, of, to-wit, forty miles per hour; (e) In operating said automobile along said public highway and in approaching and crossing said intersection without decreasing the speed thereof; (f) In failing to exercise due care to avoid colliding with plaintiff, who was a pedestrian upon a public highway; (g) In failing to give the right of way to plaintiff, a pedestrian within the boundaries of the southerly cross-walk on South Adams Street; (h) In failing to obey traffic control





signals, contrary to the ordinances of the City of Peoria and Statutes; (i) In operating said automobile when the vision of the driver thereof was obscured by an accumulation of frost, moisture, steam or other substance on the windshield and windows of said automobile.

Adams is a north and south thoroughfare fifty feet in width, and Walnut an east and west street of approximately the same width. Traffic at that location was controlled by stop-and-go lights which were in operation at the time of the occurrence. Plaintiff testified that he was walking in an eastward direction on the crosswalk on the south side of Walnut Street. He testified the light was green for east and west traffic (at the time he crossed).

The defendant, on the night in question, was driving a 1940, two-door, six passenger automobile belonging to his father. Riding with the defendant in the front seat were two passengers, Norma Smith and Pauline Walinger, who lived in Pekin, Illinois. Both passengers testified at the trial that the defendant was driving not more than twenty-five to thirty miles per hour; that he was on the right side of the street; that the light was green as they proceeded through the intersection; and that the plaintiff, when he was struck, was south of the crosswalk.

Defendant testified when he was called as an adverse witness. His pre-trial deposition had been taken on January 14, 1947. Some of his answers on these two occasions were contradictory, and much space is consumed in appellant's brief emphasizing the unreliability of defendant's version of the accident. The defendant admitted that it was a cold night and that his windshield was very foggy, and that his visibility was considerably obscured and consequently he was unable to see the plaintiff before he struck him. The record discloses many inconsistencies

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and contradictions in defendant's various accounts of the accident. Without detailing the same, let it be observed that the jury could very reasonably reach the conclusion that the defendant was negligent in some one or more respects in the operation of his automobile at the time of the accident. The jury returned a verdict finding the defendant Vernon E. Ewers not guilty and added that such result was due to the negligence of both the defendant and the plaintiff.

This unusual verdict prompts the thought that the jury determined that the plaintiff's right to recovery was barred by his own negligence. The record discloses the following evidence upon that subject. The plaintiff was employed as a bartender at a tavern owned by one Theodore Bugster located at 900 Antoinette Street, which was about three miles from the site of the accident. Plaintiff had worked at that place on Sunday evening, January 24th, and left at about midnight. He first went to a tavern at 703 South Adams Street. Then he went across the street to another tavern in the Van Sant Building. After that plaintiff walked east one block, intending to catch a street car at the corner of Walnut and Adams Street. He was asked about stopping at another tavern in that block, and he stated that he did not remember whether or not he stopped there. John Matalon, whom appellant labels a surprise witness, testified as follows: that he was fifty-four years<sup>old</sup>, ~~and~~ had been employed at Keystone Steel and Wire Company, and had known Charles Blake nine years; that he saw him on the evening in question in Bob Spender's tavern at 703 Adams, which place was known as the "703 Club"; that he was "stewed" or intoxicated; that Blake was staggering and all he would say was "Youse men want to know how cold it is, go outside and find out;" and that Blake walked up to the bar and asked for a drink as he, Matalon,

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departed. Plaintiff made a motion to strike this testimony on the ground that it had never been intimated, either in the pleadings or opening statement, that defendant was contending that plaintiff was intoxicated at the time of the accident.

Plaintiff sought to rebut this testimony by Theodore Eugster who testified that when Blake left his tavern, he was not intoxicated. Dr. Burroughs testified that he examined plaintiff shortly after the accident and observed no alcoholic odor. However, he admitted that he paid no special attention to that phase of his examination. Also, plaintiff's sister testified to like effect. Blake testified that he was visiting these various taverns at that late hour in quest of additional employment, since he had only part time work at Eugster's.

At the trial, plaintiff was exceedingly vague in his account of the accident. He testified, "I have no recollection of how the accident happened after I started out on the street." And he had no recollection of just where he was in the street when he was struck. However, plaintiff suffered a brain injury in the accident, and this may very well explain his unreliable memory. He was in a semi-delirious condition for more than thirty days, had a severe cerebral concussion, resulting in a faulty memory, staggering gait, inability to walk steadily, and periods of general confusion.

Appellant insists that, prior to the calling of Hatalon as a witness, there was not a single indication that there would be any claim that plaintiff was intoxicated at the time of the accident. On the pre-trial deposition, the plaintiff was asked if he had been drinking on the evening in question and he said, "No." The inquiry was pursued no further. Appellee's counsel contends that he stated in his opening statement at the trial that he was going to make proof of plaintiff's intoxication. Counsel for appellant asserts that this is not true, and he filed affidavits in support of his motion for new trial contradicting the same.

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On the trial, defendant's counsel did not question plaintiff in regard to his drinking just prior to the accident. It is contended that this testimony was inadmissible under the answer filed by the defendant, as no charge of intoxication was set forth therein. Section 167, Par. 43, Sub-Par. 4 of the Practice Act provides that the facts constituting any affirmative defense and any defense which by other affirmative matter seeking to avoid the legal effect or defeat the cause of action set forth in the plaintiff's complaint in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. This requirement of the Civil Practice Act was designed to avoid the very controversy that has arisen in this case.

In support of plaintiff's amended motion for a new trial, there were filed several affidavits demonstrating newly discovered evidence. It would unnecessarily prolong this opinion to detail all the facts involved in this phase of the case. Briefly, Robert Spencer and Gladys Spencer were proprietors of the tavern at 703 South Adams Street. They left the State in 1948 and were located in another state after this trial. Their testimony would completely contradict that of Matalon. Then, there was Clarence Sellers who was an eye witness to the accident. His testimony would denote negligence on the part of the defendant, and due care on the part of the plaintiff.

We do not subscribe to appellee's contention that the newly discovered evidence is cumulative or that the plaintiff failed to exercise diligence in his failure to produce those witnesses at the trial. Often it has been held that newly discovered evidence which will meet surprise evidence warrants a new trial. Felver v. Judd, 81 Ill. App. 529; Vincent v. People, 103 Ill. App. 557.





Appellant very properly complains of the large number of instructions read to the jury on behalf of the defendant. It did not require seventeen instructions to inform the jury of the law applicable to the issues, as few and simple as they were in the instant case. The language used by the court in the case of C. & I. R. R. Co. v. Lane, 30 Ill. App. 427 is appropriate here. In considering the number of instructions the court stated at page 444: "We desire again to enter our protest against the practice of deluging the jury with an unreasonable and unnecessary amount of instructions. Every principle of law involved in this case could have been clearly and correctly stated to the jury in three or four instructions at the outside of each party. A rule of law once clearly stated to the jury is enough, and it ought not to be repeated. Courts have ample power to protect themselves against this abuse, and they should not hesitate to use it. The fewer and briefer the instructions the less liability there is for error to intervene. The court should see to it that all and only such legal propositions as are applicable to the case in hand should be given to the jury, and if these propositions can be couched in two or three short instructions, then there is no necessity of confusing the jury and incumbering the record with a dozen or twenty artfully written instructions intended by the party submitting them for an argument from the court." It is fair to state that defendant's instructions as a series are vulnerable to the same criticism we had occasion to offer in the case of Baker v. Thompson, 337 Ill. App. 327.

In light of the foregoing, we are of the opinion that plaintiff is entitled to another trial.

Judgment Reversed and Remanded.



45046

ANNE ODDO,

Appellee,

v.

JASPER ODDO,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

341 I.A. 417

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendant Jasper Oddo appeals from a judgment order awarding plaintiff Anne Oddo the sum of \$25.00 per week for the support of her minor child by a prior marriage, who had been adopted by defendant.

The record shows that defendant Jasper Oddo sued plaintiff Anne Oddo for divorce in Lubbock County, Texas, and that a decree in his favor was entered by a court of said county on October 31, 1947; that in said suit Anne Oddo entered her appearance by her attorney and filed an answer; that on July 11, 1949, plaintiff filed her amended complaint for separate maintenance in the Superior Court of Cook County, and on August 5, 1949, the order appealed from was entered. No brief has been filed here by plaintiff.

It clearly appears that at the time of the filing of the amended complaint for separate maintenance and the entry of the order for support of the child plaintiff and defendant had been divorced after a hearing in which plaintiff had filed an appearance and answer. The Superior Court of Cook County was therefore without jurisdiction to enter the order complained of, Shaw v. Shaw, 332 Ill. App. 442. The judgment order is reversed.

REVERSED.

NIEMEYER and FEINBERG, JJ., concur.



45063

JERRY TUZIL and HELEN TUZIL,

Appellees,

v.

RUDOLPH SMATLAK,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

341 I.A. 418<sup>1</sup>

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

From a decree of the Circuit Court of Cook County .  
ordering reformation of a written lease, defendant, appeals.  
Plaintiffs Jerry and Helen Tuzil, husband and wife, as lessees,  
entered into a written lease with defendant as lessor on October  
31, 1946, for the premises known as 2860 West Cermak Road,  
Chicago, Illinois, to be operated as a tavern. Prior to the  
execution of the lease the entire premises, consisting of the  
tavern on the first floor and forty-two rooms on the second,  
third and fourth floors used for rooming house purposes, were  
heated by a central heating plant located in the basement.  
During the first winter of plaintiffs' occupancy heat was  
furnished to them by defendant, but after a quarrel in the  
spring of 1947 defendant shut off the heat from the two radiators  
which served the tavern, and refused further to furnish  
heat.

Plaintiffs contend that as a result of error by the  
person who prepared the lease a requirement that defendant  
furnish a reasonable amount of heat was inadvertently omitted,  
and prayed that the lease be reformed to so recite. Defendant  
denied that there was any such agreement to furnish heat.



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The matter was referred to a master in chancery, who, after a lengthy hearing, found the fact issues as contended for by plaintiffs and recommended the entry of a decree reforming the lease to require the landlord to furnish heat. The chancellor overruled objections to the master's report and entered a decree providing that "said lease is reformed to provide that lessor shall furnish heat for subject premises from the central heating plant on said property without extra charge at the usual, reasonable and customary hours during the heating seasons \* \* \*."

The findings of the master, when approved by the chancellor, will not be disturbed on review unless manifestly against the weight of the evidence, Carter v. Michel, 403 Ill. 610; Kane v. Johnson, 397 Ill. 112. Upon a careful reading of the evidence we are unable to say that they are against the manifest weight of the evidence, and, accordingly, the decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

NIEMEYER and FEINBERG, JJ., concur.





45100

AARON BODENWEISER,

Appellee,

v.

ANN BLACKBURN BANFIELD,

Appellant.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY

341 I.A. 418<sup>2</sup>

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed suit in the Superior Court of Cook County to recover real estate brokerage commissions allegedly due in the sum of \$2,500. Defendant filed an appearance, jury demand and answer to the complaint. Plaintiff filed a motion for summary judgment and defendant a countermotion for summary judgment, each supported by affidavits and opposed by counteraffidavits. From a judgment entered for plaintiff in the sum of \$2,500 and costs and a denial of her motion for summary judgment, defendant appeals.

The complaint alleges substantially that plaintiff is a real estate broker; that on October 1, 1948, he entered into a verbal agreement with defendant whereby the latter authorized him to negotiate for the sale of defendant's property at 914-16 Oakwood Boulevard, Chicago, Illinois, and that in the event plaintiff procured an agreement with a purchaser who would pay defendant the sum of \$47,500 for the property, defendant would sell and convey on terms to be agreed upon by defendant and purchaser and pay plaintiff the sum of \$2,500 as compensation; that plaintiff procured purchasers who agreed in writing to pay the sum of \$47,500



for the premises upon terms that were agreeable to defendant; that, although the purchasers have been ready, able and willing at all times since October 18, 1948, to purchase the premises, the defendant fails and refuses to consummate the transaction and to make the sale as agreed by her.

Defendant denies that she ever authorized plaintiff to negotiate for the sale of the premises, and says that she has repeatedly, and on numerous occasions, advised plaintiff that she was not ready to sell the property. She denies that she ever agreed to sell the property to the persons tendered as purchasers.

It would unduly prolong this opinion to detail the numerous affidavits submitted by both sides bearing on the contested issue, but it clearly appears to us from a careful examination that the issue of fact raised by the pleadings was not dispelled by admissions allegedly discernible in the affidavits.

Neither plaintiff nor defendant is entitled to summary judgment. As this court has said in numerous cases, and only recently in Hartford Acc. & Indem. Co. v. Mutual Trucking Co., 337 Ill. App. 140, in quoting from Macks v. Macks, 329 Ill. App. 144:

"The purpose of a summary judgment proceeding is not to try an issue of fact but to ascertain whether there is an issue of fact to try. The trial court could not under the law determine the truth of defendants' sworn petition for summary judgment, since 'the truth or falsity of facts disclosing a legal defense must be decided by a jury.' (Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523.) In Soelke v. Chicago Business Men's Racing Ass'n, 314 Ill. App. 336, it was said (p. 338): 'It is elemental that a motion [for summary judgment] under Section 57 of the Civil Practice Act [Ill. Rev. Stat. 1947, ch. 110, par. 181 \* \* \*] is not intended to be used as a means of trying an issue of fact. When there is such an issue defendant has the constitutional right to have it tried by a jury.'"



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Accordingly, the summary judgment of the Superior Court of Cook County is reversed.

REVERSED.

NIEMEYER and FEINBERG, JJ., Concur.



45103

FRANCES HYMAN,

Appellant,

v.

ZACHARY A. BISIG,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

341 I.A. 419

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for personal injuries, alleging in her complaint negligence in the operation of defendant's automobile. The complaint contained a wilful and wanton count. Upon a trial with a jury the court directed a verdict of not guilty as to the wilful and wanton count, and the jury returned a verdict of not guilty as to the balance of the complaint.

Between the hours of 12:30 and 1:00 P. M. on September 11, 1947, plaintiff was standing on the safety island adjoining the eastbound streetcar tracks on Irving Park Road near the intersection of Paulina Street, intending to cross the eastbound and westbound streetcar tracks to reach the safety island on the north side of Irving Park Road adjoining the westbound streetcar tracks. The east end of the north safety island was almost parallel with the west end of the south safety island. There is ample evidence that she was standing on the safety island when she was struck by defendant's automobile. Defendant was operating his automobile in an easterly direction in the eastbound streetcar tracks.





He testified: "She stepped on to the safety island just before I reached that point and at that time I was still straddling the northerly rail \* \* \*." The distance between the safety island adjoining the south rail of the eastbound track and the north rail of the eastbound track, which defendant claims he was straddling, would not allow any contact against the plaintiff while she was standing on the safety island.

Witnesses for plaintiff testified to varying speeds at which defendant was operating his automobile in passing the safety island upon which plaintiff was standing. One witness said that he was driving "fast," another "real high," another "quick," and one "between 30 and 40 miles per hour," and that the back end of the automobile swayed and had a tendency to go from right to left and from left to right. The evidence disclosed that the legal limit of speed in that zone was fixed at 25 miles per hour. The pavement between the safety islands, including the rails, was of cobblestone, and created a rough surface, whereas the balance of the street was paved with cement or asphalt.

It is also clear from the evidence that defendant's right window ventilator was completely open and in a horizontal position to the frame of the car, and that it was this projected window ventilator which struck plaintiff. If she was standing on the safety island, as the evidence would demonstrate, then defendant must have been driving his automobile too close to the safety island at a speed which made it highly dangerous. We said in Kuenazkes v. Chicago Transit Authority, 339 Ill. App. 249 (Abst.):



"If a safety island under such circumstances, is not a safe place for the plaintiff to stand and wait for a streetcar, rightfully expecting defendant to exercise reasonable care to prevent injury to him, then calling it a safety island is clearly a misnomer."

Whether defendant's conduct was wilful and wanton, under these circumstances, was clearly a question of fact for the jury. Schneiderman v. Interstate Transit Lines, 331 Ill. App. 143, affirmed 401 Ill. 172.

In Hyde v. Saunders, 338 Ill. App. 205 (Abst.), we held that where a passenger was on the step of a streetcar, ready to alight, and where defendant operated his automobile at a speed from 15 to 18 miles per hour, which struck the passenger, created an issue of fact for the jury as to the charge of wilful and wanton negligence. Schmidt v. Anderson, 301 Ill. App. 28; Brown v. Illinois Terminal Co., 319 Ill. 326.

The wilful and wanton count should not have been withdrawn from the jury. Among the instructions given for defendant was instruction No. 7, which was a peremptory instruction to find defendant not guilty if they found from the evidence that plaintiff was guilty of contributory negligence. This instruction clearly is inapplicable if defendant was guilty under the wilful and wanton count, since contributory negligence is not a defense to the latter charge.

The judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TUOHY, P.J., and NIEMEYER, J., concur.



45060

MARY BRIDGE,

Appellant,

v.

JAMES T. DUNN, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

341 I.A. 120<sup>1</sup>

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing her amended supplemental complaint for foreclosure of an equitable mortgage.

Plaintiff, the widow of Augustus Bridge, filed her complaint September 25, 1947 asking for partition of two parcels of land conveyed to her deceased husband by quitclaim deed June 10, 1936 from Walter Bridge, a widower. The cause was referred to a master who reported, recommending that the proceedings be dismissed for want of equity. Thereafter, on July 29, 1949, plaintiff filed a supplemental complaint alleging that on May 15, 1928 Walter Bridge gave Augustus Bridge his note for \$1,200, due in one year without interest; that on June 10, 1936 Walter gave the quitclaim deed heretofore mentioned to Augustus Bridge as security for the \$1,200 note; that this deed became an equitable mortgage and the premises were to be held only as security in payment of the debt; that the said debt has not been paid. Defendants moved to dismiss the amended supplemental complaint on the ground that foreclosure was barred by section 16 of the



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Limitations Act, requiring action to be brought within ten years from the maturity of the note unless a new promise to pay shall have been made in writing within or after the said period of ten years, in which event "an action may be commenced thereon at any time within ten years after the time of such \* \* \* promise to pay." Ill. Rev. Stat. 1947, chap. 83, par. 17. There being no allegation of a written promise to pay the original indebtedness within ten years of the filing of the supplemental complaint for foreclosure, the action was barred.

The order is affirmed.

AFFIRMED.

TUOHY P. J., and FEINBERG, J., concur.





Abstract

Gen. No. 10416.

Agenda No. 7.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
MAY TERM, A. D. 1950.

41 I.A. 20<sup>2</sup>

ANDREW PODGORNÝ,	)	
Plaintiff-Appellee,	)	
vs.	)	Appeal from the
	)	Circuit Court of
LOTTIE WONICK,	)	Winnebago County,
Defendant-Appellant.	)	Illinois.

WOLFE,-- P. J.

Andrew Podgorny procured a judgment in the Circuit Court of Winnebago County, against Lottie Wonick for the sum of \$7,000.00 for injuries he sustained by being struck by Lottie Wonick's automobile. The accident happened as Podgorny was walking north across 15th Avenue at its intersection with Christina Street in Rockford, Illinois.

Fifteenth Avenue runs in an easterly and westerly direction and is sixty-six feet wide with a paved portion of forty-one feet. There were cars parked on both sides of 15th Street at the time the accident happened. Podgorny was walking north on the east side of Christina Street, and as he came to 15th Street he walked out into the intersection and looked both ways for approaching cars. He saw cars coming, but not close enough to interfere with his crossing 15th Avenue. As he got to the center of 15th Avenue he noticed

8/22/21

Gen. No. 101-1-1

REPORT OF THE  
SPECIAL AGENT IN CHARGE  
OF THE  
BUREAU OF INVESTIGATION

ANDREW L. BROWN, JR.  
FUGITIVE  
as.  
LOTTIE W. BROWN  
FUGITIVE

WOLFE, -- E. J.  
Andrew L. Brown, Jr. was born at  
Court of Tennessee County, Tennessee, on  
sum of \$7,000.00 for his services  
by Lottie which was  
Brown was walking north  
section with Christiana Brown  
Fifteenth Avenue and in a  
direction and in sixty-six feet  
of forty-one feet. There were  
15th Street at the time  
walking north on the east side of  
came to 15th Street he  
looked both ways for  
but not close enough to  
Avenue. As he got to the center of 15th Avenue he noticed

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a car coming very fast from the east and he stopped there, let that car pass, which was being followed by another car seventy-five to eighty feet behind. He let both of these cars pass and then started to go on across the intersection when he was struck by the car of the defendant and injured.

The case was submitted to a jury and at the close of plaintiff's evidence the defendant entered a motion for a directed verdict. This motion was denied. The defendant then introduced evidence and at the close of all of the evidence, a motion was again submitted for a directed verdict and this motion likewise was overruled. Judgment was entered on the verdict and this appeal follows.

The appellant has assigned ten reasons why the judgment of the trial court should be reversed. She does not claim any error was committed in the introduction of evidence, or the instructions to the jury. She does not argue that she was not guilty of negligence in the operation of her car, which caused the injury to the defendant. The whole argument is based on the claim that the plaintiff was not in the exercise of due care and caution for his own safety, and therefore guilty of contributory negligence, which caused his injuries.

The plaintiff testified that he was standing in the center of 15th Avenue when he was injured; that he was glancing at the cars coming from the east and was getting ready to start to cross back of the car that had just passed, when he turned and looked to the left, and he was immediately struck by the defendant's automobile and knocked down. Plaintiff's son testified that his father was lying approximately in the center of 15th Avenue when he went to his assistance to pick him up.

a car coming from the west, and it was  
not until the car had passed that the  
evidently-fleeing car was seen. The  
pans and the car started to move  
was a result of the car's movement.  
The case was decided in favor of the  
plaintiff, who was awarded damages.  
directed verdict. The court  
then instructed the jury that  
damages, including interest  
and this action filed in the  
on the verdict of the jury.  
The appeal was dismissed.  
of the trial court was affirmed.  
error was corrected and the  
instructions to the jury were  
not ruling of evidence was  
corrected. The jury was  
based on the evidence and the  
of the case and the jury  
finding of evidence was  
The plaintiff's motion for  
center of the trial was  
at the same time, the jury was ready to start to  
cross back of the car, and the jury was  
looked to the fact, and the jury was  
defendant's automobile as stated in the  
testified that the driver was lying down in the  
center of 15th Avenue when he went to his assistance to pick  
him up.

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Lottie Wonick testified: "There was heavy traffic going west. I glanced and saw Mr. Podgorny going down on his face, going down. He was standing in the middle of 15th Avenue about eighteen feet from the east side of Christina Street on the south of 15th Avenue when my car came into contact with him."

Leo Wonick testified: "We were around fifty feet west of Christina Street when I first saw him. At that time as we proceeded easterly, our car was about three feet from the center of 15th Avenue south from the center. Andrew Podgorny was standing in the center of the street as we approached him; as we got close to him, I saw him turn and look west. After I saw him start across the street he walked to the center, and he stood there in the center of the street, and as we got close to him, I saw him turn and look west. We were about a car length from him when I saw him turn and look west." From this evidence it is clearly established that at the time the plaintiff was struck and injured, he was standing still, very near the center of 15th Avenue.

It is argued strenuously that the Court erred in not directing a verdict in favor of the defendant, as the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law. We cannot agree with this contention, as we think that it was a question of fact to be submitted to a jury. The law is clearly stated in the case of Moran vs. Gatz, 390 Ill. 478, and we there find the following: "The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout while crossing a street or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law, but it is a question for the jury whether he was in the exercise of



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ordinary care for his own safety."

Section 171 of Chapter 95<sup>1</sup>/<sub>2</sub> of Illinois Revised Statute provides: "Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection." This Statute does not give a pedestrian exclusive right-of-way in crossing an intersection, but he must use ordinary care for his own safety in doing so.

We think that the evidence in this case justifies it being submitted to a jury for their consideration, and they were to determine whether the plaintiff was guilty of any negligence that proximately contributed to his injuries. They, by their verdict, found in his favor and unless we can say their finding is against the manifest weight of the evidence, the verdict should stand. After a review of the evidence, it is our conclusion that it is sufficient to sustain the verdict, and the judgment of the trial court is affirmed.

Affirmed.

ordinary care for his own safety."

Section 171 of Chapter 25 of the Revised Statutes

provides: "Where traffic control is required and not in fact

in operation the driver of a vehicle shall yield the right-

of-way, slowing down or stopping if need be to avoid colliding with

pedestrian crossing the roadway within any marked crosswalk

or within any unmarked crosswalk as indicated by signs.

Statute does not give a person crossing the roadway the

in crossing an intersection. It is the duty of the driver

for his own safety to stop.

We think that the evidence in this case is sufficient

being admitted to a jury for its consideration and that

were to determine whether the driver was negligent.

negligence that he should have stopped at the intersection.

They, by their verdict, found in favor of the driver.

say their finding is not in accordance with the evidence.

ence, the verdict is not in accordance with the evidence.

ence, it is not in accordance with the evidence.

the verdict, and the judgment of the court is affirmed.

affirmed.



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Agenda No. 13.

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341.A.421

VS.

LEE MC CANN and SCHULZE BAKING COMPANY,  
an Illinois Corporation,  
Defendants and Appellants.)

On December 31, 1948, Harry Stephenson was driving a Studebaker automobile in a southerly direction upon a highway in Grundy County known as State Route 47. With him in the front seat of his auto were his daughter, Nancy Ruth Stephenson, and his father, James Stephenson. In the rear seat were his wife, Easter Lee Stephenson and his mother, Gertrude Stephenson. In front of the Stephensons, Lee McCann was driving a truck of the Schulze Baking Company. A short distance south of an intersection with another hard road McCann turned his car to the left with the intention of entering a filling station. A collision occurred between the truck and the Stephenson automobile and all of the Stephensons were injured.

On August 4, 1949, the Stephensons filed a suit in



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the Circuit Court of Grundy County in which they claimed damages for personal injuries as a result of the collision, and Harry Stephenson also for the damage done to his automobile, caused by the negligence of the defendants.

Count One relates to the damage done to Harry Stephenson and his car, and charges that he was in the exercise of ordinary care for his own safety and for the other occupants of his car. The other count charges practically the same negligence against the defendants on behalf of the guests in the car as Count One.

The defendants filed their answer in which they denied all acts of negligence on their part and charged as affirmative defense that Harry Stephenson drove his car at a high and dangerous rate of speed, to-wit; sixty miles per hour and that said speed was greater than reasonable and proper having regard to traffic and use of the way and also charged that he negligently and carelessly drove his automobile on the left side of Route 47 within one hundred feet of the intersection of Route 113, and attempted to pass a vehicle driven by McCann within one hundred feet of a viaduct contrary to the Statute of the State of Illinois, also that he attempted to pass the defendants' truck without sounding his horn, or giving any warning of his intention to pass, and this negligence on the part of Harry Stephenson was the proximate cause of the collision.

The plaintiffs each filed a reply to the affirmative defense and new matter set forth in the defendants' answer. The case was submitted to a jury who found the issues in favor of the plaintiffs and assessed Harry Stephenson's damage at \$1,500.00, Easter Stephenson at \$250.00, Nancy Stephenson at \$450.00, Gertrude Stephenson at \$750.00 and James Stephenson at \$600.00. At the close of plaintiffs' case the defendants entered a motion for a



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directed verdict, and at the close of all of the evidence they renewed their motion for a directed verdict. These motions were both denied. After the verdict of the jury, the defendants filed a motion for judgment notwithstanding the verdict and also a motion for a new trial. Both of these motions were overruled, and judgment was entered upon the verdict. It is from this judgment that the defendants have perfected an appeal to this Court.

It is first insisted that the verdict of the jury is against the manifest weight of the evidence. It will be noted in the answer of the defendants that they charged the plaintiff, Harry Stephenson, with driving at an excessive rate of speed, to-wit; sixty miles per hour. We think it is common knowledge that many people considered careful drivers, drive at the rate of sixty miles per hour and sometimes exceed that. The evidence in this case does not sustain the charge of even sixty miles per hour, as the only one that had an opportunity to observe the rate of speed testified Stephenson did not exceed fifty miles per hour at any time.

All of the witnesses for the plaintiffs testified that Harry Stephenson sounded his horn before he started to pass the truck in question. The only evidence to the contrary is the people around the filling station who were busy at other matters and did not hear any horn. It is a common knowledge that people living along a hard road get so used to hearing cars go by and horns blowing, and unless there is some special occasion to call their attention to it, they would not notice whether the horn was blowing or not. However, this is negative evidence against positive evidence, and the jury we think justly found that the defendant was not guilty of negligence in not blowing his horn when he attempted to pass the truck in question.



The evidence clearly shows that the defendant, Lee McCann, was driving the truck in a southerly direction in his proper lane of traffic south of the intersection of 47 and 113; that there is a filling station, the north end of which is about one hundred and thirty to one hundred and forty feet south of the south line of the intersection. McCann did not see the car of the Stephensons until after it struck him. McCann claims that he gradually drew over to the east side of the black line with his brake on, which also showed a warning sign to the rear of his truck of his intention to make the turn into the filling station. He did not make any signal with his hand, or give any other signal. The defendants all claim that they did not see any signal at all given of any intention to make a left-hand turn, and that McCann turned his truck abruptly to the left over into the east lane of traffic, and the collision occurred. These were all questions of fact that were submitted to the jury for their consideration. They saw and heard the witnesses testify and were in a better position than a court of review to judge the weight of the evidence of the various witnesses. From a reading of the evidence as abstracted, we are satisfied that the jury properly found in favor of the plaintiffs.

By their pleadings it is not contended that any of the plaintiffs except Harry Stephenson was guilty of any negligence that proximately contributed to the accident.

Plaintiffs insist that the verdicts of the jury for each of the plaintiffs is so grossly excessive that the judgment should be reversed and they be given a new trial. In regard to the judgment in favor of Harry Stephenson for \$1,500.00, the evidence shows that it cost \$946.79 to repair his automobile and it cost \$25.25 for the hospital bill, and while his injuries did not seem to be in any way severe, we cannot say that \$500.00

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or approximately \$500.00 for his injuries is excessive. The other plaintiffs' injuries were minor, but again this is the province of the jury to find from the evidence before them what would be a reasonable compensation for the damage which each of them has sustained.

Instruction No. 4, given on behalf of the plaintiffs informs the jury what the plaintiffs claim by the lawsuit, and describes the negligence charged in the complaint, and that the defendants deny all of these charges.

Instruction No. 5 defines the law in regard to cars making a turn either to the right, or left while upon a state highway, and if a driver violates that law, and his negligence in so doing is the proximate cause of injury to another person who is in the exercise of due care for his or her own safety, that then, the person so violating the Statute should be held liable for damages to the plaintiff.

Instruction No. 6 informs the jury that although they may believe that the plaintiff, Harry Stephenson, was guilty of negligence, which proximately contributed to cause the collision in question, still if the other plaintiffs were not by their own conduct the cause of such negligence on the part of Harry Stephenson, and at and just before the time of the collision in question, each of them was in the exercise of reasonable care for his own safety then the negligence, if any, of Harry Stephenson cannot be charged against, or imputed to any of such other plaintiffs. We think each and every one of these instructions was proper under the issues and facts as presented in this case.

We find no reversible error in this case and the judgment should be and is hereby affirmed.

Judgment affirmed.

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No. 10408

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A. D. 1950

AMERICAN STATES INSURANCE  
COMPANY,

Plaintiff-Appellee,

vs.

DELBERT J. WHITE, ROBERT L.  
BECK, GEORGE P. MARSHALL and  
HELEN W. MARSHALL, Conservator  
of the Estate of George P.  
Marshall, an Incompetent,

Defendants-Appellants

Appeal from Circuit  
Court, Winnebago County.

Honorable  
William R. Dusher,  
Judge Presiding.

341 I.A. 422<sup>1</sup>

BRISTOW, J. --- Defendants, Delbert J. White, Robert L. Beck, George P. Marshall and Helen W. Marshall, are appealing from a declaratory judgment entered by the Circuit Court of Winnebago County holding that plaintiff, American States Insurance Company had no liability under an automobile insurance policy issued to Delbert J. White, on the ground that the insured was not the owner of the vehicle as provided in the policy.

In adjudging whether there are legally sufficient grounds for voiding the policy, this court must determine the ownership of the insured vehicle at the time the policy was issued, and the effect thereof on the validity of the policy.

From the record it appears that on January 23, 1948, defendant, Delbert J. White, was notified by the Rock River Motor Company that the Buick automobile, which he had ordered some 14 months before, was in stock and ready for delivery. According to

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the testimony, defendant's half brother, Robert L. Beck, whom White had reared since childhood, had returned from naval service a few months prior to this date, and it was Delbert White's intention, as explained to the manager of Rock River Motors, to purchase the automobile with his own money, and then to sell it to Beck on time payments. At the suggestion of the manager, it was arranged that Delbert White purchase the car, but instead of paying the full purchase price in cash, as originally intended, he would pay only \$750 down, with the balance to be paid through G.M.A.C. (General Motors Acceptance Corporation.) Under this plan, Robert Beck would make the monthly payments either to G.M. A.C., or to his half brother.

A conditional sales contract between defendant White and Rock River Motors, whereby the balance of the purchase price for the car was to be financed through G.M.A.C., was executed and delivered to defendant White. Rock River Motors also executed and delivered to him an invoice showing the car was sold to him, subject to G.M.A.C. financing. There was a notation made by the manager of Rock River Motors, in what was apparently a record of orders of January 23, 1948, of the price of the automobile including \$11.00 for title and license along with the name of Delbert White.

Moreover, the bookkeeper for Rock River Motors notified the agent for the plaintiff insurance company, who customarily wrote all of defendant White's automobile insurance of the purchase, and directed him to issue a policy covering the new automobile, with Delbert White as the assured. Under the extended coverage provision, the policy covered any person driving the car with White's permission. The policy was issued and Delbert White was billed for the premium, which was paid, and retained by plaintiff.



Although there is no evidence that defendant White at any time sold or transferred the car to Robert Beck, or that Robert Beck paid any part of the consideration, there was an alleged bill of sale issued to him from Rock River Motors. The matter of procuring license plates and certificate of title was left to Rock River Motors, since it customarily attended to such matters and had done so in connection with prior purchases by defendant White. The evidence is not clear, however, how the applications for license plates and certificate of title came to be signed by Robert Beck, for he did not recall signing it, and did not even know that the certificate of title was in his name, inasmuch as it had been sent by the Secretary of State to G.M.A.C., the lien holder. Neither the manager, nor the bookkeeper had any explanation therefor, and they testified that it was understood that defendant White was the purchaser and owner of the car. The discrepancy in the certificate of title was not discovered until after the accident of July 28, 1949, involving defendant George P. Marshall.

The collision insurance was paid to defendant White immediately after the accident, and plaintiff even undertook the defense of the law suit arising out of the accident, however, plaintiff now seeks to avoid all liability under the policy on the theory advanced in this declaratory judgment proceeding, that the assured was not the owner of the vehicle at the date of the issuance of the policy.

On the basis of the foregoing evidence, the Circuit Court sustained plaintiff's contention that Beck, rather than White, had title to the insured vehicle, although the ~~xxx~~ court admitted that White apparently had some interest in the car. The court concluded, however, that the plaintiff insurance company was not liable for any

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damages arising out of the accident.

Forfeiture of insurance contracts are not ordinarily favored in the law, and unless the right to such forfeiture is clearly established, it should not be invoked. (Scott v. Inter-Ins. Ex., 352 Ill. 572; Mulconery v. Fed. Auto. Ins. Assn., 230 Ill. App. 236, 239). The only basis for avoiding the policy herein is that the assured made a false warranty or misrepresentation that he owned the vehicle insured under the policy. With reference thereto, the insurance statute provides, "No misrepresentation or false warranty shall defeat or avoid a policy of insurance, unless it shall have been made with actual intent to deceive, or materially affects either the acceptance of the risk or the hazards assumed by the company." (Ch. 73, sec. 766, Ill. Rev. Stats. 1949)

The Circuit Court specifically found that the evidence herein is devoid of any taint of fraudulent intent, therefore, the policy could only be avoided upon a showing of a misrepresentation materially affecting the acceptance of the risks or hazards assumed by the company.

With reference to the ownership of the vehicle at the time the policy was issued, the facts are undisputed that Delbert White had ordered the car some 14 months prior to the delivery date; that he had the full purchase price available in cash on the delivery date; that, at the suggestion of the manager of Rock River Motors, White paid only \$750 down and arranged for the balance to be financed through G.M.A.C.; that Robert Beck paid no part of the consideration for the automobile; and that a conditional sales contract between Delbert J. White and Rock River Motors, specifying financing through G.M.A.C., was executed and delivered to White, as well as an invoice



showing the car was sold to him. These facts and circumstances in corroborate the testimony of the parties participating/the purchase transaction, including the manager and bookkeeper of Rock River Motors, that it was their understanding that Delbert White was the owner of the car, and that he intended to sell it to Robert Beck subsequently.

It is evidence, that upon the execution of the conditional sales contract, White became the equitable owner of the vehicle, and assumed the unconditional obligation to pay for it, as well as the risks of loss incident to complete ownership. Rock River Motors merely held the legal title to secure the balance of the purchase price. It was entitled only to receive the payments, and whatever interest it had, was subject to the terms of the conditional sales agreement with Delbert White. (Hixson v. Ward, 254 Ill. App. 505, 509) Inasmuch as it could not transfer any interest which it did not have (Sherer-Gillett Co. v. Long, 318 Ill. 432), the purported bill of sale to Robert Beck, who paid no consideration whatsoever, was of no legal effect and could not pass the ownership of the vehicle. Furthermore, if the alleged bill of sale were executed after Rock River Motors assigned the conditional sales contract to G.M.A.C., it was, a fortiori, a nullity, for then Rock River Motors would not even have had the right to receive the balance of payment for the car.

Plaintiff, however, contends that the conditional sales transaction between Delbert White and Rock River Motors was designed to secure acceptance by G.M.A.C., which apparently would not contract with a minor, and that Robert Beck was the owner of the vehicle.

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No satisfactory explanation was offered why the applications for license and certificate of title were in the name of Robert Beck, unless it was through mistake, or in anticipation of Beck's eventual purchase and ownership of the vehicle after he completed all the monthly payments. In fact, the bookkeeper who handled license and title applications testified that she regarded White as the owner of the car, and had telephoned plaintiff's agent informing him that White had purchased a car, and directed him to write a policy on it.

Although the Circuit Court recognized that defendant White had some interest in the car, it held that inasmuch as the certificate of title was in the name of Robert Beck, the latter was the legal owner of the vehicle. This court cannot agree with this interpretation of the law. The certificate of title may be prima facie evidence of ownership, but it is not conclusive, and ownership has been recognized in purchasers, under the Uniform Sales Act (*Commercial Credit Corp. v. Horan*, 325 Ill. App. 625; *L. B. Motors Co. v. Prichard*, 303 Ill. App. 318), or in the donee, under common law rules (*McDonald v. Scanlon*, 331 Ill. App. 107), irrespective of the fact that the certificate of title, in each instance, was in the name of another. Courts have reiterated that the Motor Vehicle Law, and the Uniform Motor Vehicle Anti Theft Act, requiring and regulating certificates of title, are not recording acts, and do not alter provisions of the Uniform Sales Act, or other substantive rules of law. (*Commercial Credit Corp. v. Horan*, *supra*.)

It is our judgment, therefore, that according to the intention of the parties, and the operative effect of their acts, Delbert White was the purchaser and owner of the insured vehicle on the date of the issuance of the policy. Under our analysis of the case it is not necessary to consider the legal effect of the contingency of a mistake in the identity of the owner of the



~~owner~~ of the vehicle. There was no misrepresentation of ownership, and therefore, no grounds for avoiding liability on the policy. Hence, the judgment of the Circuit Court declaring that plaintiff had no liability under the insurance policy with reference to the accident involving defendant George P. Marshall must be reversed.

JUDGMENT REVERSED

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reversed.



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

MAY TERM, A. D. 1950

BLANCHE JAWORSKI,  
Plaintiff-Appellant,  
vs.  
JOHN JAWORSKI,  
Defendant-Appellee.

341 I.A. 422<sup>2</sup>  
APPEAL FROM THE  
CIRCUIT COURT OF  
LAKE COUNTY

Dove, J.

On November 8th, 1947, the parties to this proceeding were married and lived together until April 8, 1949. On July 22, 1949, the instant complaint was filed by the wife charging her husband with extreme and repeated cruelty and praying for a divorce and for support and for the custody of their child.

The complaint charged that on March 25, 1948, her husband, while intoxicated and in anger and without provocation, struck and beat the plaintiff and again, on March 12, 1949, and at other times he repeated the same treatment. The complaint further alleged that on April 8, 1949, the plaintiff was required to leave her husband by reason of his conduct and that



they have lived separate and apart since that time. The answer of the defendant admitted the marriage and that the parties have lived separate and apart since April 8, 1949, but denied all the acts of cruelty charged. The issues so made by the pleadings were submitted to the court for determination without a jury, resulting in a decree finding the issues for the defendant and dismissing the complaint for want of equity at the cost of the plaintiff. To reverse that decree the plaintiff prosecutes this appeal.

The evidence discloses that between eight and nine o'clock on the morning of March 25, 1948, the parties left their home by automobile to attend a wedding at De Kalb and did not return to their home until the next morning. They arrived at DeKalb about ten o'clock on the morning of March 25th, and, by six or seven o'clock that evening, the defendant was intoxicated and had gone to his car to rest. His wife came to the car and requested him to come in the house for dinner. He refused and, according to her testimony, he told her he hated her and for no reason at all began to swear at her and hit her in the face with his fist, knocking her head against the window of the car. About one o'clock the following morning, they left DeKalb for home; that he started to drive the car but after a short time drove near a filling station and they remained there in the car three or four hours and until about 5:30 o'clock in the morning.

Appellant further testified that on March 12, 1949, her husband went to a rifle practice and when he returned home he was drunk; that he was angry, started swearing, and followed



her into the bedroom and struck her with his fist in the face, knocking her down and causing her head to hit against the end of the bed. She further testified that on March 17, 1949, she and her husband went to another wedding in North Chicago; that he got drunk and because of his intoxicated condition, she was afraid to go home with him; that they were in the bedroom and she began to cry and thereupon he struck her with his fist and knocked her down rendering her unconscious.

Pearl Ciolek testified that she lived in North Chicago, and on March 17, 1949, was present at the wedding testified to by the plaintiff; that she followed the plaintiff and defendant into the bedroom and saw the defendant strike the plaintiff with his fist and knock her unconscious; that the witness then said to the defendant: "Now look what you did, John," and the defendant replied: "She is my wife and I will do as I please with her."

Helen Riedel testified that she was the mother of the plaintiff, and on Sunday morning, March 13, 1949, the plaintiff came over to her mother's home and the witness observed a bump on the back of her, the plaintiff's, head about the size of an egg; that at that time, in reply to her mother's question, the plaintiff stated that the defendant had struck her and knocked her down against the end of the bed; that plaintiff had told her of other occasions when defendant had beat her and particularly what had occurred at the weddings.

The defendant testified that the plaintiff was a good wife and treated him as a good wife should; that at the DeKalb wedding he started drinking whiskey and beer, highballs and mixed drinks about ten or eleven o'clock that morning; that he



felt tired and between six and seven-thirty o'clock that ~~night~~<sup>evening</sup> ~~he~~ went out to his car; that his wife came out and asked him to come in the house; that he refused, and she went back and left him in the car; that fifteen or twenty minutes later he went in and they both stayed until two or three o'clock ~~in~~ the <sup>following</sup> morning; that on the way back home, he didn't want to take any chances driving and pulled into a filling station and they slept there in the car for three or four hours. The defendant positively denied that at any time upon this occasion he struck or pushed his wife. He likewise denied that he and his wife had any argument or trouble of any kind or that he struck her on March 12, 1949.

As to the March 17, 1949 occurrence, the defendant testified that he and his wife attended the wedding of his wife's cousin about six or seven o'clock in the evening of that day; that they had something to eat and a few drinks and were sitting together having a lot of fun; that a sailor came up and called her "dearie" and she called him "darling" and that he, the defendant, told her it wasn't nice for her to call anybody "darling," whereupon she went into the bedroom and laid on the bed and cried; that he left the bedroom and met Pearl Ciolek whom he testified, "was shouting at me about my being rough and I called her a liar." The defendant admits that upon this occasion his wife was unconscious but insists he did not strike her.

Edward Jaworski, a brother of the defendant, and John Welch both testified that in February, 1949, they saw the plaintiff and a Petty Naval officer together in Belvidere and saw the petty officer kiss her. Dorothy Jaworski, the wife of Edward Jaworski, testified that upon three occasions she and the





plaintiff went to a skating rink and there met a couple of sailors and walked downtown from the skating rink with them. In rebuttal, the plaintiff admitted she and her sister-in-law walked in from the skating rink with a couple of sailors but denied any sailor kissed her. The foregoing is a fair resume of the evidence found in this record.

In order to sustain the decree of the chancellor counsel for appellee call our attention to those cases holding that where the evidence is conflicting and the finding of the chancellor is dependent upon the credence he gives the testimony of the several witnesses, the rule is that a decree will not be disturbed on appeal unless it is against the manifest weight of the evidence. (Marcy v. Marcy, 400 Ill. 152; Moore v. Moore, 88 Ill. 98; Reinken v. Reinken, 355 Ill. 539; Moore v. Moore, 335 Ill. 517; Teal v. Teal, 324 Ill. 207; Wesselhoeft v. Wesselhoeft, 369 Ill. 419; Berlingieri v. Berlingieri, 372 Ill. 60). In Ayres v. Ayres, 142 Ill. 372 at page <sup>374</sup>/<sub>375</sub>, the court said: "The charge in the bill is adultery, and testimony was given, on the hearing, proving that charge, but that testimony was directly contradicted by testimony <sup>given</sup> on behalf of the appellee. The witnesses were all examined orally before the chancellor, and he therefore had facilities for judging of the comparative credibility of these witnesses which are denied to us . . . . On the whole, we do not feel authorized to say that the decree below was not sustained by the evidence."

In the instant case, the testimony of the plaintiff and her witnesses sustained the charge of extreme and repeated cruelty. She testified to three acts of cruelty: on March 25, 1948, March 12, 1949, and March 17, 1949. She was corroborated



by the testimony of her mother, and her aunt, Pearl Ciolek testified she was present and saw the defendant knock the plaintiff unconscious on March 17, 1949. The defendant admitted his wife was unconscious upon this occasion but denied he struck her. His wholesale denial of everything testified to by his wife, her mother and her aunt is far from convincing.

After the last act of cruelty took place on March 17, 1949, the parties continued to live under the same roof until April 8, 1949, when the plaintiff left and has since made her home with her mother, and counsel for appellee insists that even though the evidence warranted a finding that he was guilty of extreme and reated cruelty, this fact alone justified a finding by the chancellor that the several acts of cruelty had been condoned. In Ollman v. Ollman, 396 Ill. 176, it was said, (pp.181-3): "Condonation, in the law of divorce, is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated and that the offender shall thereafter treat the forgiving party with conjugal kindness. (Young v. Young, 323 Ill. 608.) If the condition is broken, then the condonation is to be deemed withdrawn or avoided and the injured party may avail himself of the remedy for the acts condoned, the same as if no condonation had occurred; but the later misconduct, to be sufficient to breach the condition and avoid the condonation, must amount to more than slight acts of coldness or unkindness or mere quarreling. (Young v. Young, 323 Ill. 608; Abbott v. Abbott, 192 Ill. 439.) So long as the condition remains unbroken, the condonation is an absolute bar to the remedy for the injury condoned. Condonation is not revocable at will. The injured party cannot forgive and condone the acts and at the same time



reserve the right to assert them as a means of obtaining a divorce, if there be no further misconduct.

"Appellee claims that the defense of condonation cannot avail appellant because it is not alleged in his answer, and says this position is supported by *Lipe v. Lipe*, 327 Ill. 39, and *Klekamp v. Klekamp*, 275 Ill. 98. It has long been the rule in chancery that an affirmative defense, to be availed of, must be set up by the defendant in his answer. (*Linder v. Barnett*, 318 Ill. 259.) If he does not apprise the opposite party of such defense and set it forth in his pleadings, he is precluded from urging the same even though it may appear to be within the evidence. (*Hunsley v. Aull*, 387 Ill. 520.) This is true as a general proposition, but an action for divorce involves interests other than those of the parties litigant. The State, as the sovereign, has an interest in maintaining the integrity and permanency of the marriage relation. (*Floberg v. Floberg*, 358 Ill. 626.) A decree of divorce vitally concerns the minor children, if any, of the divorced couple, and affects, in a general way, the home life and domestic relations of the people, the public morals, the prevailing system of social order, and in a greater or lesser degree, the welfare of every citizen. These interests are not represented by either of the parties to a divorce proceeding, but the law has not left them unprotected. It is within the power of the chancellor of whom a decree of divorce is asked to stand as a representative of the public, and, in a proper case, to refuse to grant the decree, though the grounds of such refusal be without the issues made by the pleadings of the parties. (*Decker v. Decker*, 193 Ill. 285.) In all divorce suits the public occupies the position of a third party.

1. The first part of the document is a list of names and dates, arranged in two columns. The names are written in a cursive script, and the dates are in a more formal, printed style. The list appears to be a record of some kind, possibly a ledger or a list of transactions.

2. The second part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

3. The third part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

4. The fourth part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

5. The fifth part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

6. The sixth part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

7. The seventh part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

8. The eighth part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

9. The ninth part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

10. The tenth part of the document is a series of paragraphs, each beginning with a date. The text is written in a cursive script, and the dates are in a more formal, printed style. The paragraphs appear to be a record of some kind, possibly a ledger or a list of transactions.

It does not plead, but is represented by the conscience of the court; and so, whenever a defense comes out in the evidence, whether alleged or not, it is fatal to the proceeding. (Johnson v. Johnson, 381 Ill. 362) This is true, not because the defendant has any just right to take advantage of a defense which he has not pleaded, but because the public interest is involved, and the conscience of the court, appealed to by this interest, does not permit the divorce unless the facts represented on the whole record justify it. If it were otherwise, divorces would be granted in cases where the evidence disclosed that no right to a divorce existed, and the public good, which suffers from every dishonest divorce and from every one not as well within the spirit of the statute as within its terms, would be sacrificed to rules of procedure.

"In each of the cases cited and relied on by appellee, (Lipe v. Lipe, 327 Ill. 39, and Klekamp v. Klekamp, 275 Ill. 98,) the defendant argued that his acts of cruelty had been condoned by the plaintiff, but did not set up the defense in his pleadings. This court in the opinion in each case stated that the defense of condonation, to be available to the defendant, must be set up by plea or answer and that the court would have been warranted in not allowing the defendant to make this defense without having pleaded it or averred it in his answer. However, in neither the Lipe nor Klekamp case did this court refuse to consider the defense of condonation. In the Lipe case it was held that the subsequent misconduct of the defendant revived the previous offenses, and in the Klekamp case that the condonation was not proved. In the Klekamp case this court also stated that it was in the power and discretion of the court to dismiss the complainant's bill if it appeared that she had cohabited with him after





her bill was filed, without regard to the question whether or not such defense was properly pleaded by the defendant.

"The Lipe and Klekamp cases are not incorrect in holding that a defendant in a divorce action is not entitled, as a matter of right, to the defense of condonation when such defense is not alleged in his pleadings; but insofar as anything contained in those opinions would indicate that evidence of condonation appearing in a divorce suit must be disregarded by the court in rendering its decision unless condonation had been alleged as a defense, they are not in harmony with the public policy of this State and ignore the public interests involved in divorce cases. It is a doctrine of general acceptance that the State, whose duty it is to guard the marriage relation, is a party to every divorce suit, and that the interests of the State in such suit are in the keeping and under the protection of the court. Hence, whenever in the course of the trial, it appears that the action is collusive or barred, it is the duty of the court, regardless of the pleadings, fully to inquire, of its own motion, as the representative of the State, into the facts and circumstances and to act in accordance with the facts thus developed. In the instant case, it appears from appellee's own testimony that, were the charges of cruelty true, she had condoned them, and under these circumstances the court should, of its own motion, consider such fact in its decision of the case."

The factual situation in the instant case is entirely different from that in the Ollman case. In that case, the acts of cruelty occurred in January, 1943; thereafter and in October, 1943, the husband returned home and the parties lived together as husband and wife from that time until July 10, 1945, and the court held that an examination of the record disclosed no conduct



whatever upon the part of the wife sufficient to avoid the condonation and permit her to rely upon the acts of cruelty occurring in January, 1943, as grounds for divorce. In the instant case, the parties did live in the same house from March 17, 1949, until April 8, 1949. According to the testimony of the plaintiff, she did not live with her husband during that period of time as his wife, but he testified that she did. In view of our conclusion that his testimony is not convincing upon the issues made by the pleadings, we are not inclined to accept his version as to what occurred after March 17, 1949.

From a careful consideration of all the evidence found in this record, we feel that the decree appealed from is manifestly against the weight of the evidence. The decree is therefore reversed and the cause remanded.

Decree reversed and cause remanded.



45314

JONATHAN B. COOK,  
Appellee,

v.

LYMAN W. FLETCHER, JAMES T. RYAN  
and WALTER J. MECHOSKI,  
Appellants

EDWARD P. LAUTEN,  
Intervenor below

INTERLOCUTORY APPEAL  
FROM SUPERIOR COURT  
COOK COUNTY

341 I.A. 429

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendants, Lyman W. Fletcher, James T. Ryan and Walter J. Mechoski, come here on interlocutory appeal from an order for temporary injunction entered by the Superior Court of Cook County restraining them from continuing in the employ of Edward P. Lauten, a certified public accountant.

The complaint alleges in substance that at the time of the filing of the complaint and for a number of years prior plaintiff was engaged in the practice of the profession of certified public accounting and had built up the good will of a large and profitable clientele; that the defendants when employed by him as accountants entered into a so-called "Personal Good Faith Agreement," the material portion of which is as follows:

"3. That I will not, during the period of my employment, or within five years after its termination, (a) in any way, directly or indirectly, solicit, divert, take away, or attempt to solicit, divert, or take away, any of the custom, business, or patronage of my said employer, or (b) solicit or accept, for myself or others, employment as accountant or auditor or in any office capacity, from any client of his or person whose acquaintance I shall have made while in his employ; also that I will not furnish any information or make any suggestions to any other person engaged in a similar business which might encourage or assist him in soliciting, diverting or taking away such business."



This further clause also appears in the agreements signed by defendants Ryan and Mechoski:

"4. That for a period of five years after the termination of my said employment I will not directly or indirectly be engaged or interested or employed in any public accounting business conducted at any place within seventy-five miles of the location of any office of my employers as such offices are located at the time of the termination of my employment; except that I may accept employment in any territory at any time after such employment as a salaried employee of others already established, in which event I will in good faith comply with all the previous paragraphs hereof."

The complaint further alleges that as such employees the defendants were entrusted with confidential information concerning the business and affairs of the plaintiff's clients; that on or about November 19, 1946, while in the process of working on various audits in behalf of the plaintiff and his clients, defendants left the employ of plaintiff and immediately thereafter, in violation of the agreements hereinabove set forth, entered the employ of Edward P. Lauten, "a certified public accountant who had been associated with Plaintiff up to November 19, 1946 and prior thereto," and who on said date opened and thereafter maintained an office in the City of Chicago; that the defendants thereafter took away plaintiff's business and clients and disclosed to Lauten and other employees of Lauten information they had learned relating to the business and accounting work of plaintiff and his clients; that as a result of these unlawful acts on the part of the defendants plaintiff has suffered "almost the complete loss of his entire accounting business"; that defendants were in the employ of Lauten at the time of the filing of the bill and continue to serve clients served by





plaintiff while defendants were in his employ.

Defendants answered, admitting that plaintiff was engaged in the public accounting business, but alleging that "at all times mentioned in the plaintiff's complaint, until November 18, 1946, the plaintiff and one Edward P. Lauten were associated as co-partners in the practice of the profession of certified public accountants"; that at the time the defendants signed the so-called "personal good faith" agreements, the partnership between plaintiff and Lauten was subsisting; that each of the defendants was employed and paid by the partnership; that on November 18, 1946, the partnership was dissolved and that thereafter, it having become impossible for the defendants to work for the partnership, they elected to enter the employ of Lauten, who opened a certified public accounting office on November 19, 1946. The answer further sets up the fact that subsequent to the dissolution of the partnership plaintiff commenced a suit against Lauten in the Circuit Court of Cook County in which he alleged, among other things, that Lauten had violated a "Good Faith Agreement" similar to that executed by the defendants, and alleging that Lauten induced each of the defendants to break the good faith agreements sued upon. Defendants allege said suit is pending in the Circuit Court of Cook County and that all of the evidence that would be material in the trial of the instant cause is material in the former trial but that the plaintiff, for the purpose of harassing and vexing the defendants, omitted to make them defendants to that suit and waited over three years before asserting the instant claims. Certain other matters are raised by the answer which we do not deem it necessary to



this opinion to set forth.

No replication was filed to the answer of the defendants and no evidence was taken upon the issues raised by the bill and answer, but in this state of the pleadings the trial court on July 20, 1950, entered a temporary injunction restraining and enjoining the defendants, until the further order of the court, from:

"(a) In any way, for a period of 5 years from and after November 18, 1946, directly or indirectly, soliciting, diverting, or attempting to solicit, divert or take away the custom, business or patronage of the Plaintiff, or soliciting or accepting employment as accountants or auditors or in any office capacity from any client formerly served by the Plaintiff or any person whose acquaintance said Defendants shall have made while in Plaintiff's employ; from directly or indirectly engaging or being interested in or employed in any public accounting business conducted at any place within 75 miles of the location of Plaintiff's office on said date, at 120 S. La Salle Street, Chicago, Illinois, except as salaried employees of others already established prior to November 18, 1946;

"(b) Working for Edward P. Lauten as accountants or auditors or in any office capacity for a period of 5 years from November 18, 1946;

"(c) Furnishing or disclosing to anyone other than the Plaintiff or his employees entrusted with related work or Plaintiff's clients, anything that they may know or may have learned relating to the business or accounting work of the Plaintiff or of any prospective or actual client of the Plaintiff;

"(d) Using any information, working papers or files of the Plaintiff or his clients for any purposes other than serving the Plaintiff or said clients on behalf of the Plaintiff, upon Plaintiff filing with the Clerk of this Court a good and sufficient bond in the principal sum of \$10,000.00 with security to be approved by the Court."

Defendants urge that it was error to grant this temporary injunction, without evidence, in the face of the sworn denial in the defendants' answer of material averments in the plaintiff's complaint.



With this contention of defendants we are in complete accord. The complaint charges that the defendants were the individual employees of the plaintiff. The answer puts this fact squarely in issue by alleging that they were not the individual employees of plaintiff but were the employees of a partnership whose dissolution on November 18, 1946, due to causes over which defendants had no control, deprived them of employment. This contention of defendants, which, if true, terminated the employment contract and relieved defendants from the effects of the so-called "good faith" restrictions (Cook v. Lauten, 335 Ill. App. 92), stands un rebutted by any replication or otherwise.

We think this case comes within the rule stated in Miller v. Chicago Transit Authority, 339 Ill 398, where the court said at page 403:

"Defendant's answer joined issue on all the material allegations of the complaint and alleged affirmative matters of defense. No evidence was offered by plaintiffs in support of the allegations of the complaint, nor did they file a reply to defendant's verified answer. The answer presented a complete defense and, since no replication was filed, the averments of the answer must be taken as true. (Meehan v. Parsons, 271 Ill. 546; Farrell v. McKee, 36 Ill. 225; Wiedoeft v. Frank Holton & Co., 294 Ill. App. 118.)"

It is further to be noted that plaintiff in November of 1946 filed suit in the Circuit Court of Cook County against Lauten, charging that Lauten had executed a "good faith" agreement similar to those here involved, and seeking an injunction restraining Lauten from, among other things, employing the present defendants. A temporary injunction issued by the Circuit Court in that cause was reversed by this Court (Cook v. Lauten, 335 Ill. App. 92). Had Cook



-6-

diligently asserted his claimed rights under the contract these defendants could have been impleaded in that suit, with negligible additional expenditure of money and time, thus litigating in a single suit the issues raised in the instant case. It does not appeal to our sense of equity that the employment of these defendants by Lauten, almost four years after its inception, should now be disturbed, especially in view of the fact that they were not joined in the earlier suit. The general rule in this State is that a temporary injunction should be granted to preserve, and not to alter or destroy, the status quo. Northern Ill. Coal Corp. v. Langmeyer, 340 Ill. App. 423; Cleaning and Dyeing Plant Owners Ass'n v. Sterling Cleaners & Dyers, Inc., 278 Ill. App. 70; Levy v. Rosen, 258 Ill. App. 262. The employment of these defendants has existed with plaintiff's knowledge for almost four years, and the issuance of a temporary injunction disrupts, rather than preserves, the status quo.

For these reasons the order of the Superior Court of Cook County is reversed.

REVERSED.

Wieneyer, P. J., and Feinberg, J., concur.





45191

222 EAST CHESTNUT STREET COR-  
PORATION,

Appellee,

v.

WILLIAM H. MURPHY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

341 I.A. 430<sup>1</sup>

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF  
THE COURT.

Defendant appeals from a summary judgment for plaintiff in a forcible detainer action for possession of an apartment occupied by defendant. The only question raised on appeal requiring discussion by the court is the right of plaintiff to terminate the tenancy because defendant persisted in maintaining a dog in the apartment. No triable issues of fact are presented.

Defendant became an occupant of the apartment May 1, 1942 under a written lease terminating April 30, 1943. He has occupied the apartment continuously since that date and at all times has maintained a dog in the premises. On the expiration of the first lease a second lease, commencing May 1, 1943 and ending April 30, 1944, was executed. Certain rules and regulations on the reverse side were expressly made a part of the lease. Rule 7 read as follows: "Animals, birds or reptiles are not allowed on demised premises." After the termination of the second lease no further written leases were executed or agreement for occupancy of the premises entered into. Defendant became a holdover yearly tenant



under the terms and conditions of the last written lease. Goldsborough v. Gable, 140 Ill. 269; Tivnen v. Gebhart, 268 Ill. App. 259. In May of 1944 plaintiff issued a building regulation in respect to the carrying of dogs in the elevator of the building, expressly reciting therein that the regulation was "without prejudice to or waiver of the right on the part of the management to enforce strictly the prohibition in the leases and keep dogs and other animals entirely out of the building." October 19, 1949 plaintiff notified defendant to cease allowing any dog upon the premises occupied by him, and that unless defendant ceased before November 20, 1949 the violation of the lease by keeping a dog on the premises, plaintiff would terminate the lease without further notice. December 3, 1949 plaintiff served notice upon defendant of the termination of the lease because of defendant's violation of its terms by keeping a dog on the premises, such termination to take effect December 15, 1949. Defendant was requested to vacate the premises on that day. He remained in possession and the forcible detainer action was brought.

Housing Rent Regulation 825.6 permits the termination of a lease if the tenant violates a substantial obligation of the tenancy. In Barnard v. Hollingsworth, 336 Ill. App. 228, the Third Division of this court held that the keeping of a dog by the tenant constitutes a breach of the lease entitling the landlord to judgment in an action of forcible detainer. Acquiescence in violation of the lease prior to the giving of the notice on October 19, 1949, was not a bar to plaintiff's right to insist upon compliance with the lease thereafter. Vintaloro v. Pappas, 310 Ill. 115.

The summary judgment appealed from is affirmed.

**AFFIRMED.**

Tuohy, J., concurs.  
Feinberg, J., took no part.



45192

222 EAST CHESTNUT STREET  
CORPORATION,

Appellee,

v.

THOMAS C. RUSSELL,

Appellant.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

341 I.A. 430<sup>2</sup>

MR. PRESIDING JUSTICE NIMMEYER DELIVERED THE OPINION  
OF THE COURT.

As in the case of 222 East Chestnut Street Corporation v. William H. Murphy, No. 45191, defendant appeals from a summary judgment for plaintiff in a forcible detainer action for possession of the apartment occupied by defendant. The facts in the two cases are identical in legal effect, and decision of this case is controlled by the opinion in the former case.

The judgment appealed from is affirmed.

AFFIRMED.

Tuohy, J., concurs.

Feinberg, J., took no part.



45193

222 EAST CHESTNUT STREET  
CORPORATION,

Appellee,

v.

EDWARD LOEB,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

341 I.A. 431

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF  
THE COURT.

. As in the case of 222 East Chestnut Street Corpora-  
tion v. William H. Murphy, No. 45191, defendant appeals  
from a summary judgment for plaintiff in a forcible  
detainer action for possession of the apartment occupied  
by defendant. The facts in the two cases are identical  
in legal effect, and decision of this case is controlled  
by the opinion in the former case.

The judgment appealed from is affirmed.

AFFIRMED.

Tuohy, J., concurs.  
Feinberg, J., took no part.





In the  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT  
May Term, A. D. 1950

Term No. 50M13

Agenda 13

CECILIA M. RAMSDEN,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	Madison County,
	)	Illinois.
GEORGE J. NOLL,	)	
	)	
Defendant-Appellant.	)	

-----  
Honorable R. W. Griffith, Presiding Judge.

-----  
Scheineman, P.J.

341 I.A. 476<sup>1</sup>

The plaintiff, Cecelia M. Ramsden, is the former wife of defendant, George J. Noll. They separated in 1938, while residing in Alton, and she established a residence in St. Louis County, Missouri, where she obtained a decree for divorce from defendant in 1940. The decree awarded to the mother, the custody of their minor child, Mary, who was born after the separation. There being no personal service, the decree contained no provision for alimony or support.

In November, 1946, plaintiff filed this suit at law, seeking reimbursement from defendant for the cost of supporting the child during the previous eight years. In some preliminary skirmishes on the pleadings, the court sustained a plea of the Statute of Limitations as to the earlier years, and limited the claim to the period of five years prior to suit.

The cause was heard by the court without a jury, and resulted in a finding for plaintiff, fixing the amount defendant should contribute at \$20 per month for the five years, being \$1200, and allowing a credit to defendant for \$400 which he claimed he had spent on the child in the whole period. Judgment was ordered for the difference of



\$800 and costs, from which this appeal is taken.

On this appeal, the appellant does not question the right of a wife to sue at law and recover from her former husband, for the support of a minor child, which had been supported by the mother from her separate estate. We do not, therefore, enter upon any discussion of this problem, which has caused the courts some difficulty. (See collected cases in notes, 15 ALR 569, 81 ALR 887, and 131 ALR 862.)

The assignment of errors is limited to five points which may be summarized as follows: 1. There is no evidence to support the judgment. 2. The pleadings are not supported by the evidence. 3. The evidence does not show that plaintiff supported the child from plaintiff's own separate estate. 4. This is an action of assumpsit, but the judgment is a decree for alimony. 5. The evidence does not disclose a single expenditure by plaintiff from her own separate estate.

It was alleged in the complaint that defendant had failed and refused to support the child. The evidence on this point was as follows: After the birth of the child in a St. Louis hospital, plaintiff wrote several letters to defendant asking for financial help. He paid the hospital bill, but nothing else, and answered none of her letters. For a period of four months she tried to call him at his office in Alton, once a week, but he refused to receive calls from her. He did not then, and has never since supported the child. Obviously, his actions constituted a failure and refusal to support the child. It was not necessary to show that he had stated in so many words that he would not support the child, where his acts had that effect.

As to the source of the child's support, the plaintiff testified, that upon receiving no help from defendant, she went to work for General Motors, that she supported herself and the child, that she married a Mr.



Ramsden in 1943 whom she later divorced, but that she had continued to work and support Mary throughout the entire eight years. During the second marriage, the parties had lived for about a year in Buffalo, but she and her second husband both worked, and she continued to support the child. She was asked and she answered various questions as to specific expenditures from her own funds. The evidence is conclusive, being uncontradicted, that at least the major part of the support of Mary, came from the personal earnings of the plaintiff.

Much of counsel's argument is devoted to the plaintiff's testimony as to amounts of disbursements. Many of the items were estimates, and some were vague and unsatisfactory. However, others were sufficiently definite. She testified, that it was necessary to pay a woman to stay with Mary, while plaintiff was at work, that the charge was twenty-five cents per hour, which aggregated not less than \$20 per month. While living in Buffalo, the arrangement was different. Mr. Ramsden also had children by a prior marriage, the children were all cared for together while the parents were at work, but it was also necessary to hire a woman to do the house work, at \$4 for each day of such work, which plaintiff paid as her contribution toward keeping the children, besides continuing to pay Mary's other expenses.

There were other specific items in the plaintiff's testimony, and upon the whole, the amount fixed by the court was well within the proved cost to plaintiff for the child's support.

We find no basis for the charge that the court attempted to enter a chancery decree. The judgment was on findings for past expenditures for support, made by plaintiff.

The defendant testified in his own behalf, and in some respects contradicted the plaintiff. However, he does not claim that he supported the child, giving as an excuse, that he did not know where plaintiff lived, as she moved several times. He would then testify to receiving requests



for money, all of which he complied with. He fixed the various amounts as being ten or fifteen dollars, and mentioned two items of twenty dollars, the aggregate being estimated at \$400 during the whole period. He was careful to add that these items were not support, they were merely gifts. Even so, the court allowed him credit for the full amount. The odd part about it, is his repeated testimony concerning the receipt of communications, and his sending small sums, while also contending that he never knew where to send support money.

He further testified about making several visits to the child at the mother's place of abode. Apparently this caused the judge some surprise, for the court then inquired why, if he was interested enough to visit the child, he was not also interested in providing adequate support. To this, defendant again said it was because he did not know where to send support money. There were other contradictions and inconsistencies in his testimony, but the foregoing is sufficient to indicate that defendant was not a credible witness.

We conclude that the evidence supported the pleadings and the judgment, and that none of the assignments of error can be sustained. The judgment is affirmed.

Judgment Affirmed.

Culbertson, J. and Bardens, J. Concur.

(Publish Abstract only)

FILED

SEP 20 1950

*Clifford R. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS





\_\_\_\_\_

Agenda 16

Appeal from the  
Circuit Court of  
Williamson County,  
Illinois.

341A.476<sup>2</sup>

The plaintiffs brought suit for damages to their car resulting from a collision with a car owned by the defendant, Isaac Casteel, and being driven by the defendant, Mary Casteel. Defendant, Isaac Casteel, was dismissed from the suit at the close of plaintiffs' testimony.

Defendant-Appellant, Mary Casteel, makes only two assignments of error. She contends; (1) that the plaintiff was negligent and that plaintiff's negligence was the proximate cause of the collision; and (2) that the judgment is contrary to the manifest weight of the evidence.

Appellant argues that the testimony of the plaintiff, Burnice Cannon, to the effect that she was looking south and east to an intersection where she intended to make a



left hand turn and that she didn't see the defendants car back out of the parking stall is conclusive that plaintiff was guilty of negligence which was the proximate cause of the collision.

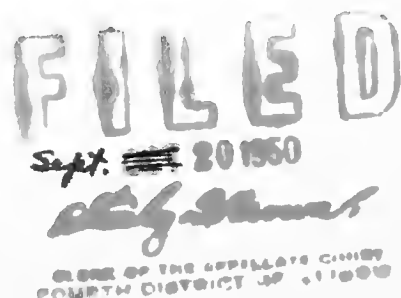
Appellant relies on the case of Harrison vs. Bingheim, 350 Ill. 269, holding that it is the duty of one driving along the highway to anticipate that cars will withdraw from parking spaces and to use reasonable care to avoid a collision. It should be noted that after this decision was handed down by our Supreme Court the Legislature adopted the Uniform Act to Regulate Traffic on the Highways. Section 64 of that act, Chapter 95 $\frac{1}{2}$ , Paragraph 161, Illinois State Bar Statutes, 1949, provides as follows: "No person shall start a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety." The drivers of both cars were under a duty to use reasonable care and the question of due care on behalf of the plaintiff depends not alone on whether she saw the other car but also on the relative speeds and positions of the cars and all the facts and circumstances surrounding the accident.

We have reviewed the evidence and are of the opinion that in this case the question of contributory negligence and the question of proximate cause were purely questions of fact and that the Court's judgment was not contrary to the manifest weight of the evidence. Therefore, the judgment should be affirmed.

Judgment affirmed.

Scheineman, P.J. and Culbertson, J. Concur.

(Publish abstract only.)



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APPELLATE COURT  
STATE OF ILLINOIS  
FOURTH DISTRICT

May Term, A. D. 1950

Term No. 50M18

Agenda 17

FLOYD E. SCHILLING,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	City Court of the
vs.	)	City of Alton.
	)	
VENITA M. SCHILLING,	)	
	)	
Defendant-Appellant.	)	

BARDENS, J.

341 I.A. 477<sup>1</sup>

This is an appeal from an order of the City Court of the City of Alton, Illinois, denying a petition of defendant-appellant to modify a divorce decree. The petition prayed for an increase in alimony and child support.

On January 22, 1948, plaintiff obtained a divorce from defendant upon an entry of appearance and default. The decree provided that plaintiff have custody of the minor daughter, then 12 years of age, and provided for \$75.00 a month alimony to defendant.

Later on defendant filed proceedings in the nature of a bill of review to set aside the decree of divorce. These proceedings were dismissed upon the entry of a modified consent decree entered by the court on October 2, 1948. At this time the daughter, Floye Ann, was 13 years old. The modified decree provided in substance as follows: (a) That defendant should have custody of the daughter with right of visitation by the plaintiff. (b) The plaintiff pay \$150.00 each month to the defendant for her support and maintenance and that defendant was a well and able bodied person capable of working and earning part of her support. (c) That plaintiff pay defendant for the support of the daughter \$50.00 a month and an additional \$100.00 per month during the nine school months. (d) That the minor



daughter was then attending Principia School in St. Louis, Missouri, and defendant was entitled to take the child out of the state of Illinois for education and living purposes.

It was obvious that both parties desired the child to continue her schooling in <sup>Principia</sup> ~~Principia~~ School.

On December 17, 1949, defendant filed the petition in question, praying an increase in alimony and support. The daughter, Floye Ann, became 14 years of age on July 15, 1949, and is still attending Principia School. Answer was filed to this petition and hearing was had before the court and on February 23, 1950, the petition was denied.

The defendant and plaintiff were the only witnesses. The defendant produced evidence tending to show that the cost of maintaining the child was more than the \$1,500.00 paid by the plaintiff. The figures given by her were, in large measure, estimates based on what she described "percentage basis." No evidence was produced to show the plaintiff was earning more than at the time of the modified decree but there was some evidence tending to show he earned less in 1949 than in 1948.

There was no evidence produced by plaintiff to show that the expenses of defendant and the daughter were materially greater at the time of the petition than at the time of the decree. Akin vs. Akin, 337 Ill. App. 648; 86 N.E. 2nd, 288. For this reason the lower court did not commit error in denying the petition. It is fundamental that on a petition to modify the court does not review its former decree but adjudges only if there has been a material change of circumstances since the prior decree. Maupin vs. Maupin, 339 Ill. App. 484; Smith vs. Smith, 334 Ill. 370. The court specifically found there was no such change. The order denying the petition to modify is therefore affirmed..

Order affirmed.

Scheineman, P.J. and Culbertson, J. Concur.  
(Publish abstract only.)

FILED

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STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
May Term, A. D. 1950

Term No. 50M11

Agenda 10

MARILYN GRIGG,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	Marion County,
	)	Illinois.
JACK A. GRIGG,	)	
	)	
Defendant-Appellant.	)	

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CULBERTSON, J.

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3411A. 477<sup>2</sup>

This is an appeal from a decree entered in the Circuit Court of Marion County, granting Appellee, MARILYN GRIGG (hereinafter called plaintiff) a divorce on grounds of adultery with an unnamed person.

The cause was heard by the Court without the intervention of a jury. The parties to the action had been previously divorced on grounds of cruelty of defendant and remarried, prior to the trial in the instant case. On a hearing of this matter in the Trial Court it developed that Appellant, JACK A. GRIGG (hereinafter called defendant) stayed away from home all night shortly after the second marriage and upon his return plaintiff found evidence in his clothing which convinced her that he had committed adultery and she testified to the fact that defendant admitted such illicit relations. Plaintiff employed certain private detectives to check on the activities of defendant. The detectives testified on the trial of the cause that defendant was with another woman, particularly on a certain evening when they saw defendant enter a room with this other woman and remain there from 1:55 a.m. until 3:00 a.m. In the complaint filed in the cause a certain person was named as the one with whom the defendant had committed



adultery, but after this lady took the stand and denied the adultery and when it appeared that there was some question of the identity of the particular individual, the attorney for the plaintiff made an oral motion to amend the complaint to charge the defendant with having adultery with "a certain female person" whose name was unknown to plaintiff. The Court below granted such leave to amend the complaint and entered a decree which contained a finding that defendant committed adultery with a female person, and likewise, granted a divorce to plaintiff on grounds of adultery, the custody of the minor child of the parties, and entered an order as to payment for the support of such minor child in the sum of \$30.00 a month.

It is contended on appeal in this Court by defendant that the evidence is insufficient to support the decree, and likewise, that the Court erred in allowing an oral motion to amend after entry of an original decree which was set aside, and after which the final decree was entered. There is another alleged error as to the admission of certain exhibits, which is not argued or identified and to which we will give no further attention in this opinion.

As to the amendment to the pleadings it has been clearly established through our Practice Act that amendments to pleadings can be made at any time before or after final judgment in the discretion of the Trial Court (1949 ILLINOIS REVISED STATUTES, Chapter 110, Section 170 (3)). We do not believe there was any abuse of discretion in the Trial Court in permitting the amendment which changed the allegation from a specific charge of adultery with a specific person to a charge of adultery with a female person who was unknown to plaintiff (FIELD vs. FIELD, 319 Ill. 268).

The province of a Judge in trying a case without a jury to determine the credibility of witnesses and the weight of the testimony of witnesses and conclude whether the evidence preponderates in favor of the plaintiff or



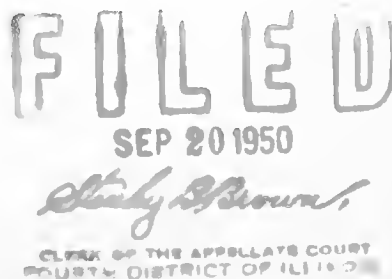
defendant has been clearly delineated in many cases in this State (PODGORNIK vs. PODGORNIK, 392 Ill. 124).

The only basic problem for consideration on appeal in this cause is whether the testimony of the detectives as to the adultery charges, coupled with that of plaintiff, is sufficient to sustain the decree granting a divorce on grounds of adultery. What constitutes evidence of adultery rests upon the particular circumstances of each case. While adultery can seldom if ever be proven by direct facts but must be inferred from circumstantial evidence, and when circumstances introduced in evidence fairly and reasonably lead to a conclusion that the act has been committed a Court will be justified in finding the charge sustained (COOKE vs. COOKE, 152 Ill. 286). The evidence of the detectives in the instant case to the effect that they saw defendant enter a room with a certain woman and remain in her apartment from 1:55 a.m. until 3:00 a.m., even though they could not see into the room because the venetian blinds were drawn, under the facts and circumstances could be taken by the Court below, in conjunction with other evidence received, as evidence of adultery, and we cannot on appeal say, as a matter of law, that such evidence under the record is insufficient to sustain the decree entered in this cause. The decree of the Circuit Court of Marion County will, therefore, be affirmed.

Affirmed.

Scheineman, P.J. and Bardens, J. Concur.

(Abstract)



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STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
May Term, A. D. 1950

Term No. 50M20

Agenda No. 14

IMOGENE A. WICK,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
-vs-	)	Madison County,
	)	Illinois.
	)	
MARTIN M. WICK,	)	
	)	
Defendant-Appellant.	)	

341 I.A. 478

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CULBERTSON, J.

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This is an appeal from an order of the Circuit Court of Madison County denying the petition of Defendant-Appellant, MARTIN M. WICK, to modify a decree of divorce entered on March 5, 1947 in a proceeding wherein the said Martin M. Wick was defendant in a divorce suit filed against him by IMOGENE A. WICK, Plaintiff-Appellee herein.

By the terms of the decree of divorce, among other things, it was provided that the plaintiff, Imogene A. Wick, was awarded custody of the two minor children of the marriage, Sharon Lynn Wick, born on November 13, 1942, and Patricia Gene Wick, born on March 19, 1945. The decree further provided that the defendant pay to the plaintiff \$100.00 per month for the support and maintenance of the children. It was further provided that the defendant have the right of visitation of said children at all reasonable times, and the right to their temporary custody at his home for periods of not more than one day at reasonable intervals, and that the plaintiff should not remove the said children from the County of Madison, in the State of Illinois; and with the further provision, however, "for the next three months plaintiff may take said children from said county and the State, and thereafter for reasonable periods





of time."

When the petition for the modification of the decree came on for hearing the plaintiff-appellee was called as a witness, and she testified in April, of 1947, she took the children with her and went to Flint, Michigan, where she was married, on April 26, 1947, to a Mr. Strahle; and that she has spent practically all of the time since the divorce in Flint, Michigan. Plaintiff further testified the petitioner came once to Michigan to see the children about two months after she was there and at that time she let him see the children; and after that she brought the children to Highland once every three months until Thanksgiving of 1948, and every time she did so she notified defendant-appellant that she was there; and that the last time the children had been brought to Madison County, until just a short time before the hearing on the petition to modify the decree, was on Thanksgiving, in 1948.

From the evidence offered by the defendant-appellant herein on the hearing, it appears he is a man thirty years of age, and has resided in Highland, Madison County, Illinois, all his life; and was at the time of the hearing, president of the Wick Organ Company. It appears defendant has not remarried, and at the time of the hearing was living alone at Highland in the house where he had resided with his wife before the divorce. Defendant testified he paid the support money provided for in the decree for the first three months after the decree was entered, but that he had not made any payment subsequent to that time, and that he had written a letter asking his former wife to return the children to Madison County and let the Court reconsider the question of their custody if it was her intention to keep the children permanently in Michigan, and that he had not received a reply to his letter.

Defendant further testified at the time of the divorce decree his family consisted of his wife and children, and his 65 year old father, and subsequent to the divorce



his father married one Edna Gowan, and thereafter, the father of the defendant died, and the step-mother of the defendant herein resides in Highland in a home left to her by defendant's father. Defendant testified, in the event the prayer of his petition was granted and the custody of the children awarded to him, it was his plan to keep the children in his home, and that his step-mother would come and live with him and make a home for the children. It appears the step-mother is acquainted with the children and has seen and talked with them, and on being called to testify in this matter, stated in the event the Court granted the custody of the children to the defendant herein, she would be in a position to assist and help him, and that the children could either come to her house or she would be willing to go to defendant's home and act as a mother for them. She is a woman 48 years of age and has no children of her own. Defendant sought to excuse his failure to comply with the terms of the decree having to do with support for the children by stating that he discontinued the payments for the reason that the children had been removed from Madison County.

A fair analysis of the evidence in this case discloses both the defendant-appellant and plaintiff-appellee are suitable persons to have the custody of the children as there is nothing in this record that is in any way derogatory to the character of either the defendant-appellant or the plaintiff-appellee.

At the conclusion of the hearing on this petition for the modification of the decree the Court denied same, and his action in so doing is assigned as error on this appeal. The Chancellor who saw and heard the witnesses in this proceeding was in a better position than this Court to determine the sincerity and credibility of the witnesses (HANDRICH vs. HANDRICH, 339 Ill. App. 151), and we would not be warranted in disturbing his findings on the ground that the evidence presented was conflicting



(HANDRICH vs. HANDRICH, supra).

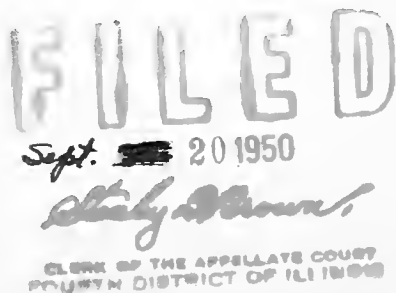
It is the policy of Courts of Review to recognize a broad discretion in a Chancellor called upon to award the custody of children (MAUPIN vs. MAUPIN, 339 Ill. App. 484), and while this decree might well be construed to place some condition on the awarding of the custody of the children of this marriage to the plaintiff-appellee herein, we do not believe there has been such a violation of that condition, under the evidence disclosed on the hearing of this cause, as would warrant any interference by this Court with the action of the Chancellor in denying the petition for the change of custody sought in this case. It must always be the guiding rule that there must be not only a change in conditions of the person deprived of the custody in the decree, but also and having greater significance to warrant a change, it must positively appear that it is to the best interests of the children effected by the proposed change that it be made, as otherwise it must be denied (MAUPIN vs. MAUPIN, supra).

We do not believe the evidence in this case offers any sufficient basis to warrant this Court in any wise interfering with the action of the Chancellor who left the custody of these two children of tender years with their mother, to whom that custody was given by the original decree in this case. The action of the Chancellor will, therefore, be affirmed.

Affirmed.

Scheineman, P.J. and Bardens, J. Concur.

(Abstract)





45117

SARA FREE,

Appellee,

v.

CHICAGO MOTOR COACH COMPANY,  
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

341 I.A. 352<sup>1</sup>

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF  
THE COURT.

Defendant appeals from a judgment of \$50,000 entered against it on the third trial of a personal injury action. The former trials resulted in disagreements of the juries.

The accident occurred March 20, 1947, a few minutes after 12 o'clock noon. Defendant's westbound bus stopped at the Pennsylvania railroad station on Jackson boulevard, Chicago. Plaintiff, a passenger, was the last person to leave by the rear door. She testified that her coat caught in the door, the bus started, forcing her to the west until she lost her balance, fell to the pavement and her left arm was run over by the rear wheels of the bus. There were no eye witnesses to the actual occurrence. Miller, a witness for plaintiff, testified that he was standing in the bus to the left of the rear exit, facing north; that plaintiff went through the door and the bus started with a kind of jerk; that two colored ladies sitting to the right of the witness screamed when the bus moved and the door closed; the bus stopped and plaintiff was lying between it and the curb. Mrs. Yorborg, called





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by defendant, testified that she was sitting next to the window on the right side in the first cross-seat forward of the rear exit; that after the bus started she glanced out of the window and saw plaintiff at about her shoulder, moving in a westerly direction with her left arm flung out against the side of the bus; she slipped down out of sight after taking a few steps. On cross-examination the witness testified that plaintiff seemed to be trying to keep her balance--to balance herself with her hand against the side of the bus; her body was moving forward and careening sideways, more or less; she was off balance. Plaintiff further testified that she was wearing a full length, heavy cloth coat, an imitation of Persian lamb, the bottom of which would be about 15 inches from the floor. Defendant contends that because of the construction and operation of the door at the rear exit, the door could not close or the bus start if an object like plaintiff's coat was caught between the front and rear sections of the door. There is no evidence that the electrical device upon which defendant relies would operate if plaintiff's coat had been caught underneath the door or between the two sections of the door within two inches of the bottom. The testimony of Mrs. Yorborg, defendant's witness, tends to corroborate the testimony of plaintiff. The verdict finding defendant guilty is not against the manifest weight of the evidence.

Defendant's objection that the court erred in permitting plaintiff in the presence of the jury to raise



her arm as far as she could, cannot be sustained. The exhibition of an injured limb to the jury is generally a matter of discretion of the trial court. In Barnstable v. Calandro, 270 Ill. App. 57, cited by defendant, the court said (p. 69):

"The courts have gone even further in permitting as proper more than a mere exhibition of the injured limb. They have held that on a trial of an action for personal injury to allow the witness to move the injured limb to demonstrate the extent to which freedom of movement has been impaired, was not error. (Tindall v. Chicago & Northwestern Ry. Co., 200 Ill. App. 556; C. & A. Ry. Co. v. Walker, 217 Ill. 605; Swalm v. City of Joliet, 219 Ill. App. 123.)"

Objection is made to the argument of plaintiff's counsel. Under the holding in Reinmueller v. Chicago Motor Coach Co., 341 Ill. App. 178 (leave to appeal denied), the argument complained of is not reversible error.

Objection is made to the giving of plaintiff's instruction No. 27, authorizing the jury to find the present value of such sum, if any, as in the judgment of the jury will be a fair and reasonable compensation for such injuries and damages, if any, as the plaintiff has sustained or will sustain. The ground of defendant's objection is that "no rule of law is laid down in the instruction upon which the jury might compute 'present value' of the sum to be awarded the plaintiff." In Hayes v. N. Y. C. R. R. Co., 328 Ill. App. 631, we held an instruction subject to criticism which authorized the jury to determine "the present value of the total amount of such future loss of earnings" without stating a formula or rule by which the jury could make the computation,



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but did not hold the giving of the instruction to be reversible error. Other objections of defendant to the admission of testimony and to the giving and refusing of instructions are not considered tenable. Discussion of each of the objections would unnecessarily extend the length of this opinion. The verdict is large, especially when compared with verdicts rendered in earlier years and before the present low purchasing value of the dollar. Plaintiff's expenses for medical and hospital care are substantial. She suffered great pain and will continue to suffer. She has permanently lost all practical use of her left arm, she has undergone four operations and, according to the undisputed medical testimony, the arm should be amputated at the elbow. The sum awarded is not so large that the verdict can be said to be the result of passion or prejudice, or to justify the court in ordering a remittitur.

The judgment is affirmed.

AFFIRMED.

Tuohy and Feinberg, JJ., concur.



45150

WILLIAM ROESLER, NELL SERENA  
STEWART, LOUISE WHEELER, HELEN  
GATTO, COLLIE CALHOUN, A. CALHOUN,  
PEARL CUHALA, HELEN COTUS, and  
LOUELLA LEACOCK,

Appellants,

v.

DAVE COOPER, HAROLD F. FITZGERALD,  
ROBERT AGNES, FLORENCE PENNELL, and  
HARRY MARBACH, and WIEBOLDT STORES,  
INC.,

Appellees.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY

342 ✓  
341 I.A. 552<sup>2</sup>

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF  
THE COURT.

Plaintiffs appeal from a decree dismissing their second amended and supplemental complaint for want of equity. The sole point relied upon for reversal is the alleged error of the trial court in denying plaintiffs' petition for a change of venue. Plaintiffs stood upon their petition and did not participate in subsequent proceedings.

The suit was instituted by twelve plaintiffs. On June 16, 1950 an order was entered on motion of plaintiffs giving leave to withdraw "Virginia Grasz and Connie and Kenneth Brooks as parties plaintiff." There was never a plaintiff by the name of Connie Brooks. Only two plaintiffs were eliminated, leaving ten plaintiffs of record. On January 17th a petition for change of venue signed and verified by only seven of the ten plaintiffs was filed. This petition was denied. Its denial is the basis of plaintiffs' appeal. Under the statute (Ill. Rev. Stats. 1949, chap. 146, sec. 9) "a change of venue shall not be granted unless the application is made by or with the





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consent of at least three-fourths of the parties, plaintiff or defendant, as the case may be." Plaintiffs contend, and the record shows, that their motion for withdrawal of plaintiffs named Virginia Grasz, Connie Prete and Kenneth Brooks as plaintiffs to be withdrawn. They insist that the naming of Connie Brooks in the order referred to above was an error; that the order should have read Connie Prete. Amendment of the record of the trial court must be made by that court. Freeport Motor Casualty Co. v. Tharp, 406 Ill. 295.

The decree is affirmed.

AFFIRMED.

Tuohy and Feinberg, JJ., concur.



45204

IN THE MATTER OF THE ESTATE  
OF PAULINE SHURKUS, Deceased.

JAMES BUTKUS, Administrator of  
the Estate of PAULINE SHURKUS,  
Deceased,

Petitioner-Appellant,

v.

LILLIAN BALSIS AUGUSTINE,  
Respondent-Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

343  
341 I.A. 553

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF  
THE COURT.

The administrator appeals from an order of the  
Circuit court dismissing his appeal from an order of the  
Probate court entered on a citation to discover assets.

This order directed the respondent to turn over to  
the administrator certain assets of comparatively small  
value and held respondent to be the owner of other property  
of much greater value. This order bears the O.K. of the  
administrator's counsel by an employee or office associate.  
There was no trial de novo in the Circuit court as required  
by section 333 of the Probate act. Apparently the appeal  
was dismissed because the O.K. made it a consent order, from  
which no appeal could be taken. Respondent moved in this  
court to dismiss the appeal and assigned the O.K. of  
counsel as one of the grounds for the motion. This motion  
was denied. In addition to the matters stated above, the  
order of the Probate court allowed an appeal by either  
party on filing a bond of \$250.00. This provision is



-2-

inconsistent with a consent of the parties to the findings of ownership of the various items of property specified in the order. The O.K. must be considered as an approval of the order as to form and not in substance. The appeal from the Probate court was properly taken and a trial de novo should have been had in the Circuit court.

The order of the Circuit court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Tuchy and Feinberg, JJ., concur.



44869

JACOB H. JAFFE and ESTHER  
JAFFE,  
Appellees,

v.

BENNETT, SPANIER & CO.,  
Incorporated,  
Appellant.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

341 I.A. 554

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE  
OPINION OF THE COURT.

Defendant appeals from an order sustaining a motion to strike paragraphs 1 to 11, inclusive, of its answer to the complaint and entering judgment against it in the sum of \$2,000, of which \$250 was assessed as attorneys' fees. The complaint states two separate causes of action--one, a sale by defendant to plaintiffs of Class D securities, not registered and qualified as required by the Illinois Securities Law; and two, fraud and misrepresentation in the sale of these securities. Defendant answers that the sale was a Class B transaction, as defined in Section 5, sub-section 7, of the Securities Act (par. 100, sub-section (7) of Chapter 121-1/2 of the Illinois Revised Statutes), and as such, was exempt from qualification. As to the second cause of action, defendant denies that there was any fraud or misrepresentation.

According to defendant, judgment was rendered against it on the theory that it had not complied with the statute exempting securities from qualification. Plaintiffs, however, contend that they also raised a





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constitutional question in the lower court with respect to sub-section (7) aforesaid. We will first dispose of the latter question.

On appeal to this court, appellees made the constitutional point and the case was thereupon transferred to the Supreme court. The point was made before the Supreme court that the question of constitutionality had not been passed upon by the lower court. The Supreme court returned the case to this court, and we conclude that in so doing they decided that a constitutional question was not involved. That point is therefore out of this case.

Sub-section 7, supra, provides that securities in Class "B" shall include the resale by a registered dealer or broker of any security acquired in the ordinary and usual course of business, at a price or prices reasonably related to the current market price, and provided further that such security is part of an issue "(a) issued by an entity domiciled in the United States, and which security is outstanding, and information as to the issuer of such security is published in a recognized manual of securities or is furnished in writing to the Secretary of State, in form and extent acceptable to the Secretary of State, such information to include a balance sheet as of a date not more than fifteen (15) months prior to the date of such resale and an income account for a period of not less than



-3-

three (3) years next prior to the date of such balance sheet, or for the period of existence of the issuer, if such period of existence be less than three (3) years." It is this last requirement which is in issue here--that is, was there a publication in a recognized manual of securities of the income account of the issuer for the period of its existence--it being conceded that such existence was less than three years. Defendant in its answer sets forth that it has fully complied; that the Standard Corporation Records issued by Standard & Poor's Corporation, publishers, is a recognized manual of securities in the City of Chicago, as required by Section 5 aforesaid, and that under date of February 26, 1947, the income account of Higgins, Inc., for the period from January 9, 1946, date of incorporation, to November 30, 1946 was published in the Standard Corporation Records, as set forth in the photostatic copy marked Exhibit "A" and attached to the answer.

Plaintiffs argue that the exhibit is inconsistent with the answer, in that the income account is for a period of ten months prior to November 30, 1946. Defendant replies that while the company was incorporated on January 9, 1946, it had no business or income account until February 1, 1946, when it acquired the plant and property of Higgins Industries, Inc., ship builders (in statutory liquidation). It appears from examination of this exhibit that the company was



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organized for the purpose of acquiring the Higgins plant and that while the formal incorporation started January 9, 1946, it was not in business until February 1, 1946. Thus, the income account would in fact comply with the law. If it be true that the income account as published was the income account of the corporation for the entire period of its existence, then the issuer complied with the law. If it be not true, then it has not so complied. That is a matter to be inquired into in a trial on the merits.

Accordingly, the case is reversed and remanded.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur.

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45160

AMBROSE J. O'MALLEY,  
Appellee,

v.

HENRY MCGURREN, Executor of the  
Estate of George H. Kelly,  
Deceased.

Appellant.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

341 I.A. 6-2

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION  
OF THE COURT.

The executor appeals from a judgment of the Circuit court on appeal from the Probate court, allowing a claim for \$1,250 for services rendered by plaintiff in the business of deceased during the year 1947.

Deceased died December 14th of that year. The claim is based on a "verbal arrangement and agreement whereby the deceased withheld the sum of \$25 per week from the claimant's pay and paid the amount so withheld during the course of each year to the claimant at the end of each calendar year." In support of the claim William J. Wyness, a witness who had known deceased and plaintiff for more than 30 years, testified that on a Saturday morning in November or December 1947, the deceased said: "Ambrose (plaintiff) has been going along pretty good now and I have been putting away a sum each week for him, give him a bundle at the end of the year." O'Dea, a son-in-law of the deceased, testified that the deceased gave his employees bonuses, usually depending on the success of the year's business and





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averaging around \$250; that in 1946 a check for \$1,500 was issued to plaintiff, who had been with deceased six to eight years and took charge of the business when the latter was on vacation. Plaintiff then testified in rebuttal, over objection, that the check paid to him on Christmas Eve 1946 was for back salary and Christmas present, \$25 per week which deceased held for him throughout 1946, which continued through 1947. A motion to strike this testimony was denied.

Plaintiff's claim is based on a verbal arrangement and agreement, and the burden was upon him to establish the arrangement and agreement and the terms thereof. The testimony of Wyness is too indefinite to be of any probative value. The sum deceased was putting away is not mentioned, there is no reference to any agreement with plaintiff for putting away any sum, and the conclusion of the statement, "give him a bundle at the end of the year," raises an inference of a gift or bonus rather than a contractual obligation to pay an unascertained sum. The testimony of plaintiff in rebuttal is merely the statement of a conclusion. No fact or circumstance is given tending to support this conclusion. The testimony was without probative force. Burnap v. Sharpsteen 149 Ill., 225; Martin v. Hertz, 224 Ill. 84; Chicago General Ry. Co. v. Kluczynski, 79 Ill. App. 221; Hollst v. Bruse, 69 Ill. App. 48. Moreover, plaintiff was an incompetent witness as to matters relating to any agreement with deceased as to his compensation for 1947. If, as contended by plaintiff, the testimony of O'Dea made him a competent witness under the third exception to section



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2, chapter 51, Illinois revised Statutes 1949, Evidence and Depositions, his competency was limited to testimony "as to the same conversation or transaction" to which O'Dea testified. O'Dea's testimony was confined to the giving of bonuses to employees in 1945 and 1946, including a check to plaintiff in 1946 for \$1,500. Plaintiff was a competent witness in respect to these transactions in 1945 and 1946, but not as to any agreement with deceased as to 1947. Mann v. Mann, 270 Ill. 83.

The judgment is reversed.

REVERSED.

Tuohy and Feinberg, JJ., concur.



45136

JAMES MATARESE,

Appellee,

v.

JESSE B. BENEDICT,

Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

310 A  
341 I.A. 6631

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in favor of plaintiff in a forcible detainer action, awarding possession of an apartment occupied by defendant as a tenant. Defendant was a tenant from month to month. On January 25, 1949, plaintiff caused a notice to be served, which undisputably defendant received, terminating the tenancy and demanding surrender of possession by March 31. On April 5, 1949, an action for forcible detainer was filed, which subsequently was dismissed on plaintiff's motion, due to the lack of a certificate relating to eviction, required by the regulations and the Federal Housing and Rent Act of 1947, as amended. On October 17, 1949, after notice to the defendant, the Housing Expediter, upon a hearing, issued to plaintiff a certificate authorizing eviction. The certificate of eviction authorized possession not earlier than October 30, 1949. The present action was instituted November 2, 1949. The Housing and Rent Act of 1947 was amended April 1, 1949.



Defendant argues that since the notice of termination of the tenancy demanded possession March 31, 1949, and the certificate of eviction issued by the Housing Expediter was under the Act as amended April 1, 1949, therefore the notice of termination could not be effective, relying upon the wording of the regulations, Section 825.6, pars. (f), (g) and (h).

It is admitted here that no rent was paid since the notice of termination and, therefore, no claim could be made the tenancy was revived after the notice of termination. The notice given effectually terminated the tenancy, and we find nothing in the Federal Housing and Rent Acts of 1947 and 1949 which requires any other notice of termination than that required by local law. It is significant that the Housing Expediter, taking cognizance of the notice of termination and the continued possession by the tenant, fixed a comparatively short waiting period in the certificate of eviction -- namely, October 30, 1949.

We think the judgment of the Municipal Court is correct, and it is affirmed.

AFFIRMED.

Niemeyer, P.J., and Tuohy, J., concur.





45169

IN THE MATTER OF THE ESTATE OF  
JOHN B. ROSS, DECEASED.

RAYMOND G. ROSS, LESLIE E. ROSS,  
and HELEN R. HABERSTEIN,  
Petitioners-Appellees  
and Cross-Appellants,

and

SEYMOUR S. PRICE,  
Guardian ad litem for  
the estate of John B.  
Ross, deceased,  
Appellee and Cross-  
Appellant,

v.

MARY B. ROSS,  
Respondent-Appellant  
and Cross-Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

341 I.A. 663<sup>2</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the Circuit Court, requiring Mary B. Ross, as administratrix of the estate of her deceased husband (for convenience referred to as respondent), to include in the inventory in said estate a controversial item of \$20,425 in cash, representing the contents of a safety deposit box in the Lincoln Security National Bank of Chicago, which was found by the Circuit Court to belong to the estate. The court found that the furniture and furnishings in the home occupied by deceased and respondent were the property of respondent. From this finding as to the furniture and furnishings, petitioners have cross-appealed.

The record discloses the following essential facts, out of which this controversy arose. Decedent and respond-



ent had been married twenty-four years at the time of his death. Petitioners were the three children of the decedent by a former marriage. One son was born of the marriage of respondent and decedent. Deceased was a physician and surgeon and 76 years of age at the time of his death.

The safety deposit box, identified as box No. 1363 in the Lincoln Security National Bank, was in the name of respondent, the decedent being designated as deputy with authority to enter the box under the name of John Leslie, the reason for the assumed name not being explained, but left to inference. No creditor of decedent is a party to the instant proceeding. The cash referred to admittedly represents the proceeds of the sale of certain stock, which had been issued and was in the name of respondent many years before the death of Dr. Ross in June, 1947. The sale of the several certificates of stock occurred during the months of April, August and September, 1945. These certificates of stock were first kept in a strong box in the home of respondent and deceased but were finally removed to the safety deposit box in question. The certificates of stock had been endorsed in blank by respondent and so kept in the safety deposit box until the sale thereof. The sale was made through a regular brokerage firm, and checks representing the proceeds in question were issued by said brokerage firm, payable to respondent, endorsed by her, and the cash kept in said safety deposit box.

On April 21, 1932, decedent filed a voluntary peti-



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tion in bankruptcy and procured his discharge October 10, 1932. The certificates of stock were not included in his bankruptcy schedules.

It was the theory of the petitioners in the trial court, and repeated here, that the certificates of stock were caused to be issued in the name of respondent by decedent for the purpose of defrauding his creditors. There is no evidence that respondent knew at any time that decedent contemplated bankruptcy or that his purpose was to defraud creditors. In our view of the controlling question presented, we think it immaterial whether she had knowledge of the alleged intended fraud upon creditors. Petitioners argue that the facts and circumstances disclosed by the record clearly indicate that the transfer of the stock into the name of respondent was not a gift to her but a device employed to defraud creditors. Such an intention is never presumed except when the facts and circumstances clearly justify it. The fact that decedent did not include the stock in his schedule of assets would support a fair inference that he did not regard himself as the owner of the stock. Even if decedent made the transfer with intent to defraud creditors, petitioners, who are his heirs, would have no greater right to reclaim the stock or the proceeds of the stock than would the deceased, if he were alive. Paris v. Morris, 331 Ill. App. 367, 370. We said in the case cited:

"It has been the settled rule in equity in this State that the law will not permit a person to delib-



erately put his property out of his control for a fraudulent purpose, or permit those in privity with him to do so, and then assist either through the intervention of a court of equity in regaining the same after such fraudulent purpose has been accomplished." (Citing Creighton v. Elgin, 395 Ill. 87.)

The rule of law announced is controlling upon these petitioners.

As to the cross-appeal involving the household furniture and furnishings, it appears without dispute that from money given respondent from time to time by her husband, she bought most of the items involved, and used in the home for a number of years. Under the doctrine of Koch v. Sallee, 176 Ill. App. 379, and Bromwell v. Estate of Bromwell, 139 Ill. 424, the court was correct in holding that the furniture and furnishings belonged to respondent.

The order appealed from also found that \$429, representing the balance in the checking account of the deceased at the time of his death, belonged to the estate, as well as two watches, and directed that they be included in the inventory. Respondent does not appeal from the latter portion of the order. Accordingly, the order of the Circuit Court respecting the cash item of \$20,425 is reversed, and the order as to the cash item of \$429 and the two watches and the household furniture and furnishings is affirmed and the cause remanded with directions to the Circuit Court to enter an order in conformity with the views herein expressed.

AFFIRMED IN PART AND REVERSED IN PART  
AND REMANDED WITH DIRECTIONS.

Niemeyer, P. J., and Tuohy, J., concur





45110

IRVING H. SIEGAL,  
Appellant,

v.

TRAV-LER RADIO CORPORATION,  
Appellee.

)  
)  
) APPEAL FROM SUPERIOR  
)  
) COURT, COOK COUNTY.

)  
) **341 I.A. 664**

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint in chancery seeking to restrain defendant from manufacturing and selling certain radio cabinets, an accounting for profits made from the sale of said cabinets, and a judgment for \$115,000 for loss of profits and investment by virtue of defendant's alleged conversion of plaintiff's radio cabinet. Motion to dismiss the complaint was allowed on the ground that the present action is barred by a prior judgment of the Superior Court of Cook County.

It appears from the pleadings that in November of 1940 plaintiff purchased from the receiver in bankruptcy of the Telex Radio and Television Corporation a steel mold used in the manufacture of plastic radio cabinets. This mold at that time was in the possession of International Molded Plastics, Inc. In January of 1941 the mold was sold by International to the defendant here. On October 25, 1945, plaintiff filed suit against International in the Superior Court of Cook County (No. 45 S 2085), alleging that International converted the mold to its own use. There was a trial and a judgment for plaintiff in the sum of \$1,350, which was later satisfied. In November of 1945 plaintiff filed a suit in the Superior Court of Cook County (No. 45 S 21035)



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against Trav-Ler Karenola Radio and Television Corporation, alleging conversion of the steel mold, unlawful appropriation of the design of the radio cabinet, and unlawful use of profits. On motion the suit was dismissed on the ground that the satisfaction of the judgment against International for conversion constituted a bar to the proceedings, and on appeal here (333 Ill. App. 158) the dismissal was affirmed.

On April 21, 1948, the present suit was filed, praying for an accounting of profits made by the defendant in the use of the mold, judgment for \$115,000 representing a loss of investment and profits, and for an injunction to restrain the defendant from using the mold. A motion to dismiss was filed setting forth that the present cause of action was barred by the prior judgment in cause No. 45 S 21035. This motion was denied when it came on for hearing before Superior Court Judge McKinlay, but leave was granted to file an amended motion. Subsequently the matter came on in due course for hearing before Judge Graber on amended motion to dismiss the complaint on the ground, among others, that the present suit was barred by the prior judgment obtained by plaintiff against International in cause No. 45 S 20825. From an order dismissing the complaint, plaintiff prosecutes this appeal.

We are of the opinion that the complaint in the instant suit does not present a materially different cause of action from that which was before the Superior



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Court of Cook County in the prior suit. In each case the plaintiff's right of action rests upon the right, title and interest acquired by plaintiff at the bankruptcy sale of the assets of Telex Radio and Television Corporation. Plaintiff in his suit against International charged that he had acquired title to the mold by purchase and that the attempted sale by International to the defendant here constituted a conversion. That matter was litigated and determined in favor of the plaintiff and satisfaction had. Plaintiff's claim must, of necessity, depend upon what title, right or interest he has in the plastic mold in question, from which the cabinets with the special design were made. In Hodur v. Cutting, 248 Ill. App. 145, 149, this court held that the legal effect of a judgment in trover for a specific chattel, when satisfied, is to transfer the title, rights and interest thereto in the defendant. We reaffirmed this doctrine on the former appeal of this matter (333 Ill. App. 158). The motion to dismiss in the instant case set forth the undisputed fact of the rendition of the judgment in trover against International and the satisfaction thereof. Plaintiff having lost his title to the mold in question and all incidental rights therein, he can have no basis for the present action. The unnecessary recital in the order appealed from, "that the decision \* \* \* in case No. 45 S 21035 is res judicata of the issues herein presented," instead of the trover action, No. 45 S 20825, is of no material consequence. The



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reason assigned in the order for the conclusion reached, even if wrong, is immaterial if the conclusion is correct.

Plaintiff argues that, the motion to dismiss as originally filed having been denied by Judge McKinlay and no motion made to modify or set aside this original order, and the amended motion having been heard by Judge Graber, defendant is bound by the prior order. The contention is without merit. The issue of whether or not there had been a prior adjudication of the matters involved in this suit was properly before Judge Graber. He was not deprived of jurisdiction by any prior order in the cause. Fort Dearborn Lodge v. Klein, 115 Ill. 177.

The judgment order of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

Nieneyer, P. J., and Feinberg, J., concur.





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Abstract

Gen No. 10417

Agenda No. 8

IN THE  
APPELLATE COURT OF ILLINOIS

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SECOND DISTRICT  
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May Term, A.D. 1950

KATHRYN FAHRLANDER,  
Plaintiff-Appellant,

vs.

JOHN MACK,  
Defendant-Appellee.

341 I.A. 665

APPEAL FROM THE  
CIRCUIT COURT OF  
GRUNDY COUNTY

Dove, J.

About eight o'clock, Daylight Saving Time, on the evening of August 21, 1948, Louis Fahrlander was driving a motorcycle in a southerly direction on Route 47 in the City of Morris, Illinois. He was accompanied by his wife, who was seated on the seat of the motorcycle directly in the rear of her husband. Jefferson Street is a paved street running east and west and intersects Route 47, and Fahrlander intended to cross the intersection and proceed south to Springfield, Illinois. At the same time, John Mack, the defendant, was driving his automobile in a northerly direction along Route 47 and at the intersection made a left hand turn intending to proceed west in Jefferson Street. There was a collision between the motorcycle



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THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LANDS

WASHINGTON

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OFFICE OF THE ASSISTANT SECRETARY

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and the automobile, and as a result thereof Kathryn Fahrlander was injured and subsequently this action was instituted by her against John Mack, to recover damages for the personal injuries she sustained.

The complaint alleged that the plaintiff was at all times in the exercise of due care and caution for her own safety and charged that Mack drove his automobile upon the occasion in question carelessly, negligently and improperly across the center line of Route 47 without keeping a good and sufficient lookout and at a rate of speed that was greater than was reasonable and proper and without having due regard for vehicles approaching from the opposite direction, and that Mack turned his motor vehicle from a direct course on the highway when such movement could not be made with reasonable safety. The defendant filed his answer denying the allegations of due care on the part of the plaintiff and, also, the charges of negligence. The issues thus made were submitted to the court for determination, a jury being waived, resulting in a finding and judgment in favor of the defendant, and the plaintiff appeals.

The evidence discloses that Route 47 at this intersection is approximately 36 feet wide, and Jefferson Street, from the north to the south curb line is 26 feet wide. Both highways are paved, and there is a black line in the center of the pavement on Route 47. Mr. Mack, 64 years of age, was alone in his automobile. As abstracted, this is his version of what transpired: "I was traveling 20 or 30 miles per hour until I came to the intersection. I slowed up but did not wait for any southbound cars before making the turn. I was about three feet into the left turn when the accident occurred. At the time of the accident I had made the left

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turn and was across the center line of the intersection. The motorcycle on which Mrs. Fahrlander was a passenger was on the right hand, or west side of the pavement. I do not know what part of the motorcycle I struck. It was a glancing blow. I did not see the motorcycle at all before the impact. I do not know whether I struck the motorcycle itself or Mrs. Fahrlander. I traveled about a foot or two after the impact before I stopped my car. When my car stopped it was in the southbound lane, going west on Jefferson Street. My car was still in the intersection blocking the southbound traffic. I had come practically to a stop to see if there was any traffic approaching from the north and south, but I did not see the motorcycle approaching. I had a conversation with Mr. Fahrlander. He asked me if I didn't see where I was driving. I said yes, but I never saw him until we hit. I do not know what speed the motorcycle was traveling. Prior to and at the time of the accident I had my dimmers on, two oblong separate lights usually called parking lights. I did not have my road headlights turned on. At the time I was looking for my friend, Claude Francis. It was about 8:00 P.M. It was twilight or just getting dusk."

As abstracted, Louis Fahrlander, the husband of the plaintiff and driver of the motorcycle, testified: "I was driving south on a motorcycle on Route 47. Wern were going to Springfield to the Fair, and my wife Kathryn, was with me. Immediately preceding the accident I was traveling between 20 and 25 miles per hour. The motorcycle was traveling about three feet from the west curb which is the right hand side of Route 47 going south. The headlights of the motorcycle were on. We were in the intersection.



Mr. Mack made a left hand turn. The point of impact was in my lane of traffic about three feet from the right hand curb of Route 47. The accident occurred about at the south-west corner of the intersection. I didn't see Mr. Mack's car prior to the collision."

The plaintiff testified: "We turned our lights on outside of Morris and were riding along at a leisurely rate. When we came to the intersection, I was looking over my husband's shoulder, right shoulder, so I don't know of course what struck me. The impact threw the bike into a wobble, and it eventually fell on its side catching my foot underneath it. The accident occurred past the center of the intersection, south of the center of the intersection. It would be the southwest corner of the intersection. At the time of the accident the motorcycle was about 3 feet from the west curb of 47. I did not see the Mack car. I am 36 years old."

On behalf of the defendant, Ida Marie Lois testified that she lived on the northwest corner of the intersection of Jefferson Street and Route 47; that she heard the collision which occurred about 7:55 P.M., Daylight Saving Time, and then looked out of the window of her home and saw an object on the pavement but did not see any light on the object or any cars and could not tell whether the object she saw was a motorcycle or not. Claude Francis testified that he was standing on the porch of his home waiting for the defendant; that he saw the motorcycle just about the time of the impact, as his house was the second house west of the intersection on the north side of Jefferson Street; that the impact occurred a little to the north of the middle of the intersection;





that Mr. Mack's dimmer lights were on, but he did not see any lights on the motorcycle.

The trial court found that plaintiff and her husband were co-owners of the motorcycle upon which they were riding; that "neither the plaintiff or her husband maintained a proper lookout for other traffic on the highway; that they were engaged in a joint enterprise, providing transportation for themselves to the Springfield State Fair; that neither saw the approaching car driven by defendant and that the failure of the husband to observe the defendant's car constituted negligence which contributed to the injury and his negligence was imputable to the plaintiff; that had the plaintiff's husband observed the defendant, as would an ordinary prudent person under like or similar circumstances, he would have avoided the accident by a slight swerve or turn of the motorcycle to the right thereby avoiding the glancing and slight contact with defendant's automobile which caused the injury."

The evidence in this record discloses that appellant and her husband were prior to the accident both gainfully employed and that she and her husband "pooled" their earnings, as she expressed it, and the motorcycle they were riding upon this occasion was purchased from their common fund. It also appears that in her testimony appellant referred to the motorcycle as "our" motorcycle. Appellant, however, made no proof as to the amount of money she contributed toward the purchase of this motorcycle nor does it appear who had the title thereto. Counsel for appellant insist that the defense of joint enterprise was not raised by the pleadings and not raised in the trial court until after the evidence was concluded and the cause taken under advisement by the trial court. There is no merit in this contention as/paragraph one of the complaint are: "That on/<sup>the</sup> the allegations of

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21st day of August, 1948, plaintiff was riding as a passenger on a certain motorcycle being driven by a certain other person in a southerly direction on Route 47 at a point in or about the intersection of Jefferson Street with said highway in the city of Morris, Grundy County, Illinois." Paragraph one of the answer of the defendant admits the allegations of said paragraph 1 of the complaint "except the defendant denies that the plaintiff was riding as a passenger on a certain motorcycle." Whether appellant was or was not a passenger on the motorcycle was ~~therefore~~ an issue upon the trial. In our view of the case, however, it is not necessary to determine whether, at the time of the collision, appellant and her husband were engaged in a joint enterprise.

At the time of this occurrence our statute provided that any driver of a vehicle approaching an intersection with the intent to make a left turn shall do so with caution and with due regard for traffic approaching from the opposite direction and shall not make a left turn until he can do so with safety. (Ill. Rev. St., Chap. 95 $\frac{1}{2}$ , sec. 166.) The driver of the motorcycle, as well as appellant, had a right to assume that a driver of a car approaching this intersection and intending to make a left turn into Jefferson Street would comply with this requirement. (Dees v. Moore, 335 Ill. App. 318, 324.)

We have read the testimony of the several witnesses and examined the photographs of the intersection found in the record. There is very little conflict in the evidence. The weather was clear, the pavement was dry and it was dusk. The motorcycle upon which appellant was riding was being driven by her husband in the proper lane of traffic three or four feet east of the west edge of the pavement. It was being driven at a reasonable rate of speed and,



under the provisions of our statute, had the right of way over cars coming from the opposite direction and making a left turn.

The judgment of the trial court, as we have said, was based upon a finding that the driver of the motorcycle was guilty of contributory negligence because he testified that he did not see appellee's automobile in the west traffic lane of Route 47 until after the impact. The evidence is that appellee's car did not have its head lights burning but only its parking lights. Appellee came up to this intersection driving at a speed of twenty or thirty miles per hour; he did not see any southbound traffic, so he did not stop his car but slowed down and turned directly into the west or southbound traffic lane of Route 47, and the front end of the motorcycle, traveling within three feet of the west edge of that traffic lane, passed safely in front of appellee's car but the rear of the motorcycle received a glancing blow from the front end of appellee's car. The evidence is that the driver of the motorcycle as he ~~was~~ approached the intersection was looking to the south, the direction he was proceeding. He <sup>testified he</sup> observed cars traveling the east traffic lane going north. There was nothing to indicate there was any danger until appellee's car had proceeded across the center line of Route 47 and into the west traffic lane. Under these conditions it does not follow that the driver of the motorcycle was guilty of contributory negligence in not seeing appellee's automobile prior to the time of the impact. Irrespective of the speed appellee's car was traveling, it would have been a moment or two at the most after it crossed the center line of Route 47 and into the west traffic lane until it came in contact with the motorcycle.

We recognize that the question of contributory negligence was a question of fact to be determined by the trial court, but under



the circumstances and conditions and the conceded facts as shown by the record in this case to have existed just prior to and at the time of the collision, the finding of the trial court that the driver of the motorcycle was guilty of contributory negligence which precluded a recovery by appellant is not sustained by the evidence.

The judgment of the Circuit Court is therefore reversed and the cause remanded.

Reversed and remanded.











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